385 Constitutional guarantees; generally

A constitutional right is a right guaranteed to the citizens by a constitution and so guaranteed as to prevent legislative interference with that right.

Observation: A constitutional entitlement cannot be created, as if by estoppel, merely because a wholly and expressly discretionary state privilege has been granted generously in the past.

Although a fundamental right guaranteed by the United States Constitution is not immune from reasonable governmental regulation if constitutional safeguards are satisfied, such a right cannot be imposed on or destroyed under the guise or device of being regulated.

Caution: It must be remembered that the Constitution permits the reasonable regulation only of an individual's actions. Beliefs, as opposed to acts, are not subject to reasonable times, place, or manner restrictions.

A difference exists between a political or social interest and a constitutional right. If not warranted by any just occasion, the least imposition on fundamental constitutional rights is oppressive, regardless of whether it is direct or indirect, intentional or only incidental. And if a law has no other purpose than to chill the assertion of fundamental constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.

Practice guide: In determining whether a state's action has needlessly chilled the exercise of a basic constitutional right, the question is not whether the chilling effect is incidental rather than intentional; instead, the question is whether that effect is unnecessary and therefore excessive.

A violation of constitutional magnitude may be established even though there has not been a complete abridgement or deprivation of a constitutional right, since a constitutional violation may result when a constitutional right has been impermissibly burdened or impaired by virtue of state action that unnecessarily chills or penalizes the free exercise of the right. In this connection, the importance of a constitutional right does not, by itself, determine its scope, and the court must hark back to the historical origins of the right, particularly the evils at which it was intended to strike.

Constitutional rights, for the most part, are not absolute, but must be enjoyed with some limitations. The problem of preserving individual rights under the Constitution and still securing to the state the right to protect itself is not always an easy one, and it is sometimes difficult to find the proper balance between them, there being no mathematical formula for accommodating the rights of the individual to the good of the community.

Legislation is unnecessary to enable the courts to give effect to constitutional provisions guaranteeing the fundamental rights of life, liberty, and protection of property.

386 Immutability

Individual rights under our constitutions are immutable against all hostile legislation which is not required by considerations of public health or safety, and such rights may not be made to yield to mere convenience, even if the majority of the people choose that they be.

387 Application of strict scrutiny test

Whenever it is determined that legislation significantly interferes with the exercise of a fundamental right, a court must review the legislation with strict judicial scrutiny, under which the state must demonstrate that the statute serves a compelling state interest, and that the state's objectives could not be achieved by any less restrictive measures. Even a legitimate and substantial government purpose cannot be achieved by means which are unnecessarily broad and which tend to stifle fundamental personal liberties when that end might be more narrowly achieved. If there are other, reasonable ways to achieve a compelling state purpose with a lesser burden on the constitutionally protected activity, the state may not choose the way of greater interference; if it acts at all, it must choose the less drastic means. The state generally has the burden of establishing that a state restriction which affects a fundamental right is necessarily related to a compelling interest.

Observation: The same rule applies to municipalities, that is, when rights specifically protected by the Bill of Rights are curtailed by municipal regulations, strict scrutiny applies, and the municipality must demonstrate a compelling interest to justify their existence.

388 Bills of Rights

Bills of Rights are often included as part of constitutions, and are intended to protect citizens from governmental transgressions of certain fundamental rights, but they are not designed to protect citizens from the invasion of such rights by

individuals. The purpose of a Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by courts. A Bill of Rights is designed to protect people from the state, not to ensure that the state supplies minimum levels of safety or comfort.

Primacy of position in the state constitution is often accorded such a declaration of rights, thus emphasizing the importance of those basic and inalienable rights of personal liberty and private property which are thereby reserved and guaranteed to the people and protected from arbitrary invasion or impairment from any governmental quarter. Such a declaration of rights constitutes a limitation upon the powers of every department of the state government. Indeed, it is often specifically provided in the Bill of Rights contained in a state constitution that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property.

Bills of rights are sometimes said to be merely declaratory of fundamental rights existing independent of constitutional declarations, and they are usually considered as being intended for the protection of individuals and of minorities. Any governmental action in violation of rights declared in a bill of rights is void, so that the provisions of a bill of rights are self-executing to this extent; however, the legislature may enact laws to protect and enforce the provisions of the bill of rights.

Observation: In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall; as long as the state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, then state constitutions and state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

389 "Natural" rights mentioned in constitution

Statements by some courts seem to indicate constitutional protection for rights termed "natural," in addition to rights protected under the specific guarantee safeguarding a person in his or her life, liberty, or pursuit of happiness.

Caution: Not all courts agree with this viewpoint. For instance, the Connecticut Supreme Court has said that neither the social compact clause of the Connecticut Constitution, nor its counterpart, natural law, constitutes a source of unenumerated rights under the Connecticut constitutional scheme. Unenumerated constitutional rights exist, if at all, the court has said, only if they are grounded in or derived from the constitutional text of Connecticut's unique historical record.

Of the now-called "fundamental rights" binding upon the states through the Fourteenth Amendment, practically all were deemed natural rights by the American founding fathers. This is assuredly so of freedom of religion. Similarly, freedom of assembly and association were recognized as natural rights before they became constitutional rights. The right to contract and the right to own property have also been termed inherent rights. And what is embraced within the constitutional property right has been determined largely from natural right and natural law sources. The leading test of substantive due process, the reasonableness norm, has manifold natural law antecedents. Procedural due process, as well, has customarily been defined by recourse to natural law and natural right principles.

390 Other rights as "natural"

A natural affection between the parents and offspring has always been recognized an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed. It has also been held that the right to beget and bear children is a natural and constitutional right.

Observation: An unmarried mother has no right to bring an action challenging the constitutionality of a state statute requiring children born to unmarried mothers to have their mother's surname, inasmuch as a parent's right to name a child is not a fundamental right subject to strict scrutiny for purposes of the due process and equal protection clauses. Natural law has also been suggested as the basis of the right of privacy.

Not every good thing, on the other hand, is constitutionally required, and not every grievous loss visited upon a person by the government is sufficient to invoke constitutional protections. Thus, the right to attend the educational institutions of the state is not a natural right; it is a gift of civilization, a benefaction of the law. Similarly, the position has been taken that the right of serving as a juror is not a natural right, but one conferred or imposed by statute and which may be restricted, abridged, denied, or enlarged by the legislature. And the right to make a testamentary disposition of property

is generally considered not to be an inherent, natural, or even constitutional right, although there is some contrary authority in this regard.

391 "Free man" philosophy

Some persons in our society have declared themselves "free men," and as such not subject to state or federal laws requiring them, for example, to pay taxes or obtain drivers' licenses. However, there is no natural right or liberty under the Constitution to be totally free from any need to obey lawful federal and state laws, rules, and regulations. An individual has no right to unilaterally withdraw from society, rejecting his or her obligations to that body, while at the same time retaining the advantages of that society, advantages for which others have sacrificed part of their liberty, inasmuch as the concept of ordered liberty precludes allowing every person to adhere to his or her own private standards of conduct on matters in which society has important interests.

392 Entitlement to constitutional rights; individuals

Constitutional rights and guarantees extend to rich and poor alike, to public officers and employees as well as to private persons, to the guilty as well as the innocent, to juveniles and to alleged mentally incompetent persons, to those with notorious and unsavory reputations as well as to those who are models of upright citizenship, and to children as well as adults.

Caution: However, as used in the Fourteenth Amendment, the word "person" does not include the unborn.

Even prisoners in penal institutions enjoy many protections of the Constitution, and generally retain all the rights of ordinary citizens, except those expressly, or by necessary implication, taken from them by law.

Certain provisions of the United States Constitution are couched in such unqualified and absolutely prohibitory terms that it is not open to doubt that aliens may, in appropriate cases, successfully invoke their protection. Other constitutional provisions are by their terms applicable only to citizens, such as the provision that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. In any event, aliens who have not yet entered into the territorial jurisdiction of the United States do not enjoy the protection of Constitutional provisions.

393 Business and governmental entities

A corporation is within the protection of some constitutional guarantees, such as property rights, but not others, such as the Fifth Amendment protection against self-incrimination. Constitutional guarantees of personal rights are inapplicable to impersonal administrative agencies exercising special and limited powers, such as boards of school trustees, which have no existence except by legislative enactment, and possess no natural rights and exercise no functions except those specially granted to them. Municipalities lack constitutional rights not only against the state, but also against state agencies and other municipal bodies created by the state. However, they may assert claims against the creating state under the supremacy clause.

It has been held that a state itself is not a "person" within the meaning of the constitutional guarantees relating to due process of law, equal rights, and privileges and immunities, and therefore cannot assert that its own enactments deny it such rights.

394 State's obligation regarding entitlement

While a state may not hinder one's exercise of choices protected under the Constitution, it is not obligated to remove obstacles to the exercise of constitutional rights that it did not create (including a lack of financial resources), or to generally provide substantive services to those within its borders, nor is it under any obligation to fund the exercise of constitutional rights.

395 Doctrine of unconstitutional conditions

The "doctrine of unconstitutional conditions" holds that the government ordinarily may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. The doctrine of unconstitutional conditions, where applied, requires a court to employ strict scrutiny in analyzing the challenged condition. The doctrine of unconstitutional conditions requires that in order to condition a grant of a discretionary benefit on the release of a constitutional right, the government must have an interest which outweighs the particular right at issue. [n72]

396 Enforcement of rights; against whom enforceable

The guarantee of a constitutional right ensures the citizen the privilege of having such a right judicially declared and protected, and the courts are ever alert to protect the citizen against encroachment by the sovereign, since experience has shown that where such encroachment is extended, a corresponding liberty is curtailed, seldom if ever to be restored. Constitutional mandates cannot be avoided and individual rights violated by exalting form over substance. There are no

differences in degree of the denial of constitutionally protected liberties, and no governmental act can be approved on the ground that it is only "a little bit unconstitutional."

The Federal Bill of Rights does not as such provide rights which are enforceable against the state governments, although the Fourteenth Amendment applies to states and embraces such rights. However, the Fourteenth Amendment has reference to state action exclusively, and does not have the effect of taking into federal control the protection of private rights against invasion by private individuals.

Appropriate rights contained in a state Bill of Rights may be enforced against individuals. The inalienable rights secured by a state constitution are, however, designed to protect individual rights against unconstitutional invasion by the state, as well as from violation by other governmental agencies and private individuals.

Observation: A state cannot legislate or otherwise determine what constitutes a fundamental principle of justice and liberty so as to be worthy of protection under the United States Constitution. Thus, a state-created substantive rights claim cannot be enforced in a federal court.

397 Limitations on rights

Not every right secured by the state or federal constitutions is fundamental, but rather only those which lie at the heart of the relationship between the individual and republican form of nationally integrated government. Even these fundamental constitutional rights of individuals are not absolute, limitless, or unrestricted rights.

Observation: Courts must be careful not to transmute vital constitutional liberties into doctrinaire dogma. In particular, the Federal Constitution is not intended to serve as the font of tort law, creating remedies for private citizens against state action in the absence of any violation of a specific constitutional safeguard.

Every constitutional right or privilege must be enjoyed with such limitations as are necessary to make its enjoyment by each consistent with a like enjoyment by all, since the right of all is superior to the right of any one. Thus, even the essential rights of the First Amendment in some instances are subject to the elemental need for order, without which the guarantees of civil rights to others would be a mockery. And, in each case of attack on a statute, ordinance, or court rule as unconstitutional, there must be a balancing of public welfare against personal rights and the determination of the delicate question of which shall prevail.

At the same time, in every case where legislative abridgment of fundamental constitutional rights is asserted, the courts should be astute to examine the effect of the challenged legislation; only a compelling state interest in regulation of a subject within a state's constitutional power to regulate can justify limitation of fundamental freedoms, and a legislative enactment regulating such rights must be narrowly drawn, so as to express only the legitimate and compelling state interests at stake. It is clear that penalties ordinarily cannot be imposed for the exercise of constitutional rights.

398 First 10 amendments

The first 10 amendments to the Federal Constitution were adopted almost immediately after the adoption of the Constitution itself, and are in the nature of a Bill of Rights. Their adoption was insisted on and took place in order to quiet the apprehension of many that without some such declaration of rights, the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be inalienable rights. These first 10 amendments to the United States Constitution limit the powers of the Federal Government. Without promise of a limiting Bill of Rights, it is doubtful that the Federal Constitution could have mustered enough strength to gain ratification. It is well settled that these 10 amendments, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which the colonists had inherited from their English ancestors and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.

399 Resume of provisions

The first 10 amendments to the United States Constitution -- the Bill of Rights -- aim to protect the citizenry against government infringement of certain fundamental rights held to be necessary to keep the government responsive and of other rights or privileges felt to be necessary as protection against oppressive legal proceedings. Thus, it is provided that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the government.

The first 10 amendments also state that the right to bear arms shall not be infringed, and provide against the quartering of soldiers, unreasonable searches and seizures, excessive bail, excessive fines, cruel and unusual punishments, double

jeopardy, compelled self-incrimination, deprivation of life, liberty, or property without due process of law, and the taking of property for public use without just compensation.

Further, the first 10 amendments provide for preservation of the right of trial by jury and the right to presentment or indictment of a grand jury; they accord the right to one accused of crime to a speedy and public trial by an impartial jury of the state and district, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him or her, to have compulsory process for obtaining witnesses in his or her favor, and to have the assistance of counsel for his or her defense; and they specify that the enumeration in the Constitution of certain rights is not be construed to deny or disparage other rights retained by the people. The last of the first 10 amendments contains the statement that not all of the rights of the people are enumerated and that unspecified powers are reserved to the states or to the people.

400 As protecting unspecified fundamental rights; "penumbra" doctrine

Certain rights, although not specifically mentioned in the Federal Constitution, have come to be recognized as fundamental rights that are protected by provisions of the Constitution and that may not be infringed on by the government. Thus, the United States Supreme Court has developed a doctrine that the specific guarantees in the Bill of Rights have "penumbras" or shadows formed by emanations from those guarantees that help give them life and substance. In other words, specific rights guaranteed by the first eight amendments of the Constitution necessarily suggest other peripheral, but nevertheless fundamental, rights that must also be protected, such as the right of privacy, the right to travel, and freedom of association.

Caution: The fact that constitutional guarantees continue to evolve over time, however, does not mean that a court is allowed to create new guarantees that are not present in either the text or the intent of the Constitution.

Closely allied or related to the "penumbra" doctrine is the belief that the Ninth Amendment to the United States Constitution recognizes the existence of rights other than those enumerated in the Constitution, and that therefore fundamental, but unspecified, rights still belong to the people.

401 Applicability to state and federal governments

Although the matter may be largely academic in view of later holdings as to the operation of the Fourteenth Amendment, the extent of the operation of the Federal Bill of Rights is well settled. Since the Constitution of the United States takes from the states, for federal exercise, only enumerated express powers and those necessarily implied, and moreover, since the states are left with all powers of sovereignty whose exercise is not expressly forbidden, the limitations that the Constitution of the United States imposes upon the powers of government are upon the Federal Government only, except where the states are expressly mentioned. In the application of this doctrine specifically to the guarantees contained in the Federal Bill of Rights, it has been held since the early days of our constitutional history that the first 10 amendments or, as some of the authorities more accurately put it, the first eight amendments, forbid the abridgment only by acts of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to acts of the states, or to private persons or businesses.

The doctrine so stated is still the law. Technically and strictly speaking, the first eight amendments themselves do not forbid the states to abridge the rights which are so guaranteed against federal infringement. The Supreme Court in an early case, however, inferred that the first eight amendments did not apply to the states, "except so far as the Fourteenth Amendment may have made them applicable." As a practical matter, since the doctrine has become established that the Due Process Clause of the Fourteenth Amendment, in its concept of "liberty," forbids a denial of any of the fundamental principles of liberty and justice, the rule is well established that any of the rights enumerated in the first eight amendments which may also be held to be in the nature of fundamental principles of liberty and justice are absolutely protected from any state action or infringement by the Fourteenth Amendment in exactly the same manner as they are protected from federal abridgment by the guarantees of the Federal Bill of Rights.

402 Later amendments

The amendments to the Federal Constitution ratified since the first 10, as additions to the organic law, obviously affect the relationship of the people to their governments, and apply to both the national and the state governments.

The Eleventh Amendment, prohibiting suits by private individuals against a state, has been described as a limitation of a power supposed to have been included in the original instrument. The Twelfth Amendment regulates the mode of electing the President and Vice-President of the United States. The Thirteenth Amendment abolished slavery and involuntary servitude except as a punishment for crime, while the Fourteenth Amendment prohibited the states from abridging the

privileges or immunities of citizens of the United States, or depriving persons of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws.

Observation: By later judicial construction, the Fourteenth Amendment was held to extend to the states many or most of the limitations imposed upon the Federal Government by the first 10 amendments which constitute the Bill of Rights.

The Fifteenth Amendment to the Federal Constitution is a restriction upon state action, having as its special object to put the right of suffrage, so far as race, color, and previous condition of servitude are concerned, forever at rest. The Sixteenth Amendment permits the imposition of a federal income tax. The Seventeenth Amendment provides for the election of United States Senators by vote of the people of the several states. The Eighteenth Amendment (which was repealed by the Twenty-First), prohibited generally the manufacture, sale, or transportation of intoxicating liquors within the United States, its territories, districts, or possessions. The Nineteenth Amendment may be regarded as further limiting abridgment of the general suffrage rights of the people by providing that neither the United States nor any state shall deny or abridge the right of citizens to vote because of their sex. The Twentieth Amendment governs the time at which the President and Vice President shall take office, certain matters governing the succession to those high executive offices, the time for the assembly of Congress, and the duty of Congress to assemble. The primary purpose of the Twenty-First Amendment was to repeal the Eighteenth, but it also prohibits the transportation or importation of intoxicating liquors into any state, territory, or possession, in violation of the local law. The Twenty-Second Amendment is the "two-term" amendment, designed to bar election to the presidency of one twice elected to that office, or one once elected thereto after serving more than two years of the term to which another was elected. The Twenty-Third Amendment provides for presidential electors for the District of Columbia. Denial of the right of citizens to vote in primary or other elections for President or Vice President, for elections for President or Vice President, or for Senator or Representative in Congress, on the ground of failure to pay any poll tax or other tax, is prohibited by the Twenty-Fourth Amendment. The Twenty-Fifth Amendment provides for Presidential succession in case of the death, removal, resignation, incapacity, or disability of the President, and succession to the office of Vice President in case of a vacancy in that office. The Twenty-Sixth Amendment, ratified in 1971, generally extends voting rights to persons 18 years old and older. The last amendment, the Twenty-Seventh, was first proposed in 1789 but was not ratified by the requisite number of state legislatures until 1992. The amendment reads "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." Other amendments have been proposed from time to time, some of the most notable being --

-- an amendment which would have prohibited a denial or abridgment of rights on account of sex, and was popularly known as the Equal Rights Amendment, or, simply, ERA.

-- an amendment which would have required a balanced federal budget.

-- an antibusing amendment, which would have outlawed the use of busing as a remedy in school desegregation cases. None of these proposed amendments was ever ratified, however.

403 Fourteenth Amendment and effect thereof; generally

Section 1 of the Fourteenth Amendment states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Sections 2 through 4 in the Amendment deal, respectively, with apportionment of Representatives, disqualification to hold office, and the validity of the public debt of the United States. Section 5, which is the final provision, states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."Because of the limitations which it places upon state power, the Fourteenth Amendment has come to be one of tremendous significance. In the ascertainment of the validity of state action or legislation from the standpoint of constitutionality, the test is by measurement against the guarantees included in the amendment, either the privileges and immunities of citizens, or more broadly, equal protection of the laws and due process of law to persons, since the rule is well settled that every state power is limited by the inhibitions of the Fourteenth Amendment.

Observation: However, where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing a plaintiff's claims.

The effect of the Fourteenth Amendment to limit the powers of the state and thereby to extend correspondingly the rights of persons safeguarded from abridgment is strikingly illustrated by the doctrine through which fundamental rights, similar in nature to the rights safeguarded from federal abridgment by the first eight amendments, have already been protected (and in a steadily expanding sphere of extent, are constantly being protected) from state infringement by the Fourteenth Amendment. The Supreme Court pointed out, at a fairly early date after the enactment of the Fourteenth Amendment, that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. This is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law. The general test as to whether a right is so included in the Due Process Clause of the Fourteenth Amendment was said to be: "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law." Thereafter, in numerous decisions affirming in principle what it had intimated before, the Supreme Court laid down the rule which is now the accepted and settled principle, that the Due Process Clause requires that state action, through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

404 Complete or "selective" incorporation of Bill of Rights

Although some members of the Supreme Court have deemed the Fourteenth Amendment to incorporate the Bill of Rights (actually, the first eight amendments) in its totality, a majority of the Supreme Court has never adopted this view and has, in fact, specifically rejected it, stating that the Fourteenth Amendment was not a shorthand incorporation of the first eight amendments. What has evolved instead has become known as the doctrine of "selective incorporation," which means that the Fourteenth Amendment "incorporates specific provisions of the Bill of Rights, and those that are 'absorbed' at all are incorporated whole and intact, providing protections against the states exactly congruent with those against the Federal Government." The doctrine of "selective incorporation" has, without a discernible distinction in meaning or effect, been expressed by the United States Supreme Court in varying language. Ordinarily, the Court states that a specific provision of the Bill of Rights is made obligatory on the states through or by reason or by virtue of the Fourteenth Amendment or its due process clause. But sometimes the Court merely states that a provision of the Bill of Rights is applicable to the states without referring to the Fourteenth Amendment, or is "incorporated," or "absorbed" in the Fourteenth Amendment or its due process clause.

405 Specific provisions of Bill of Rights as applicable to states

In making a determination as to which provisions of the Bill of Rights of the United States Constitution are applicable to the states, the Supreme Court has concluded that, once it is decided that a particular guarantee of the Bill of Rights is "fundamental to the American scheme of justice," the same constitutional standards apply against both the state and federal governments. Many guarantees in the Federal Bill of Rights have been held to be fundamental rights protected by the Fourteenth Amendment against infringement by the states. Among those are the First Amendment freedoms of speech, press, religion, assembly, and association, and the right to petition the government, and the Fourth Amendment protection against unreasonable searches and seizures and requisites as to search warrants.

The Second Amendment's guarantee of the right to keep and bear arms has been held not applicable to the states. But the Third Amendment, prohibiting the quartering of soldiers in private homes without the consent of the owner, has been held to recognize zones of privacy with which a state cannot interfere.

It is now well settled that the Fourteenth Amendment guarantees to an accused in a state court the protection of the Fifth Amendment's privilege against self-incrimination. And the Supreme Court has held that the double jeopardy clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. The Supreme Court has also stated that the Fifth Amendment's prohibition against taking private property for public use without just compensation is applicable to the states. On the other hand, it seems unlikely that the Supreme Court will depart from its earlier holdings under which the Fifth Amendment requirement of indictment by grand jury is not applicable to the states. As regards the rights protected by the Sixth Amendment, it is settled that the Confrontation Clause, the "compulsory process" clause, and the "assistance of counsel" clause are made obligatory upon the states by the Due Process Clause of the Fourteenth Amendment. The same is true of the right to a speedy and public trial. The Sixth Amendment's requirement of trial by jury in criminal cases also applies to the states. And if a state affords a jury trial, the guarantee of an impartial jury has been held applicable. The Seventh Amendment's provisions as to the right to trial by jury in civil cases and as to the functions of a court and jury have been held not applicable to the states. The Eighth Amendment's provision against

cruel and unusual punishment has been held applicable to the states. The Supreme Court has extended this ruling to the "excessive fines" and "excessive bail" provisions of the Eighth Amendment.

406 To whom the Fourteenth Amendment applies

Every state official, whether high or low, and whether his or her function is legislative, executive, or judicial, is bound by the Fourteenth Amendment. Section 1 of the Fourteenth Amendment repeatedly uses the word "state" in announcing various prohibitions.

Observation: The Supreme Court has held that neither territories nor the District of Columbia are "states" within the meaning of the Fourteenth Amendment. However, the practical effect of this holding with respect to the District of Columbia has to a great extent been abrogated by the subsequent action of Congress in amending 42 USCA ß 1983 so as to include the District of Columbia within that statute's scope. Furthermore, federal protections afforded to the citizens of the several states through the Fourteenth Amendment, as it is construed today, have always been directly available to citizens of the District of Columbia through operation of the Bill of Rights.

The Court has held that, like other provisions of the Bill of Rights, the Seventh Amendment, which provides that in suits at common law where the value in controversy shall exceed $ 20 the right of trial by jury shall be preserved, is fully applicable to courts established by Congress in the District of Col1umbia, and that the protections accorded by either the Due Process Clause of the Fifth Amendment or the due process and equal protection clauses of the Fourteenth Amendment apply to residents of Puerto Rico.

The Fourteenth Amendment itself erects no shield against merely private conduct, however discriminatory or wrongful the conduct may be.

407 Generally

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." The amendment was adopted to curtail the power of Congress to interfere with an individual's freedom to believe, to worship, and to express himself or herself in accordance with the dictates of his or her own conscience.

Another purpose behind the adoption of the First Amendment was to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hands of an intolerant society. At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence; government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the government, contravenes this essential right.

Fundamental constitutional rights and guarantees, including those in the First Amendment, are not absolute or unrestricted, and are subject to reasonable limitation and control. Thus, while the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, judicial formulae generally are not to be imposed that are so rigid that they become a straitjacket that disables the government from responding to serious problems.

408 To whom the First Amendment applies

The First Amendment is technically an inhibition to Congress only, and not to the states; moreover, it does not have any effect upon the transactions of individual citizens, even where those transactions take place within the framework of a regulatory regime such as broadcasting. However, the adoption of the Fourteenth Amendment and its construction in numerous Supreme Court decisions has resulted in the extension of many of the limitations contained in the Bill of Rights to the states, including, specifically, the First Amendment guarantees relating to religion, speech and press, assembly, petition for redress of grievances, and association.

409 Validity of legislation, in general

In determining the validity of legislation where a violation of protected First Amendment freedoms has been alleged, a comprehensive review of the entire record is important to assure that no intrusion upon them has occurred. Moreover, in appraising a statute's inhibitory effect upon First Amendment rights, the United States Supreme Court will not hesitate to take into account the possible applications of the statute in other factual contexts besides the one being specifically considered. In this connection, it has been held that the limit placed upon the power of the states by the Fourteenth Amendment is not narrower than that placed upon the national government by the First Amendment, but, by the same token, it has also been held that stricter scrutiny of validity should not be exercised in instances of a national statute under the First Amendment than in those of a state statute under the Fourteenth Amendment. Decisions of the United

States Supreme Court as to whether a congressional act contravenes the First Amendment are authoritative when a state court considers whether a state enactment contravenes the Fourteenth Amendment.

Courts will not assume in advance that Congress will pass legislation in violation of the First Amendment, and will presume, until the contrary appears, that Congress will fulfill its obligation to defend and preserve the Constitution.

410 Vagueness of legislation

The vagueness of a content-based regulation of speech raises special First Amendment concerns because of its obvious chilling effect on free speech. Thus, reasonable certainty in statutes is more essential than usual when vagueness might induce individuals to forgo their First Amendment rights for fear of violating an unclear law.

While a statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law, a statute which, upon its face, and as authoritatively construed, is so vague as to permit the punishment of the fair use of the opportunity of free political discussion is repugnant to the guarantee of liberty contained in the Fourteenth Amendment. Vague laws in any area suffer a constitutional infirmity, but when First Amendment rights are involved, the United States Supreme Court looks even more closely lest, under the guise of regulating conduct that is reachable by the police power, a First Amendment freedom suffers; such a law must be narrowly drawn to prevent the supposed evil. Because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity. Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; precision of regulation must be the touchstone in an area so closely involving our most precious freedoms. And since standards of permissible statutory vagueness are strict in the area of free expression, the United States Supreme Court will not assume that an ambiguous line between permitted and prohibited activities curtails constitutionally protected activity as little as possible, or that in subsequent enforcement of the statute, ambiguities will be resolved in favor of adequate protection of First Amendment rights.

Observation: Although the Supreme Court has held that the application of the overbreadth doctrine is inappropriate in commercial speech cases, it has not limited the reach of the vagueness doctrine in the same way.

411 Overbreadth of legislation; generally

"Overbreadth" is a judicially created doctrine designed to prevent the chilling of protected expression. The doctrine of overbreadth derives from the recognition that an unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review. Numerous decisions have dealt with the question whether legislation is invalid, upon its face or as applied, because due to its overbreadth, it infringes upon First Amendment rights, that is, the rights of free speech and press, of freedom of religion, of peaceful assembly and association, and of petitioning the government for a redress of grievances.

The doctrine of overbreadth is of relatively recent origin. Claims of facial overbreadth have been entertained in cases: (1) involving statutes which, by their terms, seek to regulate "only spoken words," in such cases it being the judgment of the court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effect of overly broad statutes; (2) where the court thought that rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations; and (3) where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct and such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.

Practice guide: In order to prevail on a facial attack on the constitutionality of a statute on grounds of overbreadth, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas, or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.

The distinction between the doctrine of overbreadth and the doctrine of vagueness is that the overbreadth doctrine is applicable primarily in the First Amendment area and may render void legislation which is lacking neither in clarity nor precision, whereas the vagueness doctrine is based on the due process clauses of the Fifth and Fourteenth Amendments and is applicable solely to legislation which is lacking in clarity and precision.

Observation: However, in some cases, legislation has been struck down on the grounds of both overbreadth and vagueness, and the Supreme Court has not always made a clear distinction between the two doctrines.

While in general there is no such thing as a First Amendment challenge for "underbreadth," that is, an underinclusiveness of the law, as evidenced by the failure of government to regulate other, similar activity, such a circumstance may, in some rare cases, give rise to the conclusion that the government has in fact made an impermissible distinction on the basis of the content of regulated speech.

412 Procedural aspects of doctrine

The general rule governing the standing of a party to challenge the constitutionality of legislation is that a litigant to whom a statute may constitutionally be applied will not be heard to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. However, the Supreme Court has recognized some limited exceptions to this rule in the presence of the most "weighty countervailing policies."

One of these modifications or exceptions has been carved out by the Supreme Court in the area of the First Amendment, where the court, altering its traditional rules of standing, permits attacks on overly broad statutes without requiring that the person making the attack demonstrate that his or her own conduct cannot be regulated by a statute drawn with the requisite narrow specificity. A defendant's standing to challenge a statute on First Amendment grounds as facially overbroad has been held not to depend upon whether his or her own activity is shown to be constitutionally privileged. In other words, although a statute or ordinance is not vague, overbroad, or otherwise invalid as applied to conduct charged against a particular defendant, he or she is permitted by the court to raise its unconstitutional vagueness or overbreadth as applied to other persons in situations not before the court. The same rule applies to corporations and other entities. However, a litigant has no standing to attack legislation on overbreadth grounds, where he or she does not claim a specific present subjective harm or a threat of specific future harm, or where the alleged overbreadth is not substantial. Also, the overbreadth exception to the general rule of standing has less weight in the military than in the civilian context, and has ordinarily not been applied by the Supreme Court to litigation in areas other than those relating to the First Amendment.

In addition, the doctrine of abstention -- under which, as a general proposition, a federal court, confronted with issues of constitutional dimension which implicate or depend upon unsettled questions of state law, should abstain and stay its proceedings until those state law questions are definitely resolved by the state courts -- has been held inapplicable where a clear and precise state statute, not susceptible to a narrowing construction by the state courts, is challenged on the grounds of overbreadth.

413 Substantive aspects of doctrine

The Supreme Court's departure from traditional rules of standing in the First Amendment area, discussed in the preceding section, has been held by the Court also to have consequences in deciding an overbreadth case on its merits. The Supreme Court has ruled that if a law is found deficient because of overbreadth as applied to others, it may not be applied to the particular litigant either, until and unless a satisfactorily limiting construction is placed on the legislation. In addition, the Supreme Court has stated the following general rules for determining whether a statute is overbroad or not:

.legislation is unconstitutionally overbroad where it is susceptible of application to conduct protected by the First Amendment

.a challenge of overbreadth is based on the ground that legislation, even if lacking neither clarity nor precision, offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of freedom protected by the First Amendment

.where conduct and not mere speech is involved, the overbreadth must not only be real, but substantial as well, judged in relation to the challenged statute's plainly legitimate sweep

.the breadth of legislative abridgement of First Amendment rights must be viewed in the light of less drastic or narrower means for achieving the same basic purpose

.where statutes have an overbroad sweep, just as where they are vague, the hazard of loss or substantial impairment of the precious First Amendment rights may be critical, since those persons covered by the statutes are bound to limit their behavior to that which is unquestionably safe.

Observation: An important factor considered by the Supreme Court in determining the overbreadth of legislation is the Court's balancing of the governmental interests involved against First Amendment rights.

Where First Amendment freedoms are at stake, precision of drafting and clarity of purpose of regulating legislation are essential. While the government may regulate the content of constitutionally protected speech in order to promote a compelling interest, it must choose the least restrictive means to further the articulated interest.

In public places considered to be public forums, the government's ability to permissibly restrict expressive conduct is very limited. The government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. Additional restrictions, such as an absolute prohibition on a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest. Thus, the consequence of the Court's departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute challenged on the ground of overbreadth is totally forbidden, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrents to the constitutionally protected expression. Obviously, for this rule to apply, the legislation must be susceptible of a narrowing construction in the first place.

The application of the overbreadth doctrine has been held by the Supreme Court to be limited to freedoms guaranteed by the Bill of Rights. On the other hand, there are cases in which legislation occasionally has been held to be overbroad and hence to violate provisions of the Federal Constitution other than the freedoms guaranteed by the Bill of Rights.

Caution: The overbreadth doctrine does not apply to commercial speech.

The Supreme Court has observed that declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine," and that such a declaration has been employed by the Court sparingly and only as a last resort. In regard to the overbreadth doctrine, a declaration of facial invalidity of legislation has been held inappropriate where: (1) there are a substantial number of situations to which the legislation might be validly applied; (2) the legislation covers a whole range of easily identifiable and constitutionally proscribable conduct; or (3) the legislation is susceptible of a narrowing construction.

In determining whether legislation which violates the First Amendment on the ground of overbreadth may be saved from invalidity by a narrowing construction, the Supreme Court has made a distinction, based on a general rule, not limited to the overbreadth doctrine, between the scope of its review of federal and of state statutes. This general rule is to the effect that the Supreme Court lacks jurisdiction to authoritatively construe state legislation so as to avoid constitutional issues, but has the power to give a federal statute such authoritative construction. The Court has also ruled that only the state courts can supply the requisite narrowing construction, since the Supreme Court lacks jurisdiction to authoritatively construe state legislation. The Court, on the other hand, has observed that although its interpretation of a state statute is obviously not binding on state authorities, a federal court still must determine what a state statute means before it can judge its facial constitutionality. Where possible, the Court gives federal legislation a narrowing construction, whereas the determination of the issue of overbreadth of state legislation depends upon whether a state court has given the legislation in question a properly narrowing construction. In many cases, an overbreadth challenge to state legislation has been rejected by the Supreme Court on the ground that the state courts had given such legislation a narrowing construction. On the other hand, in other cases state legislation has been held invalid on the ground of overbreadth since the state court's construction of such legislation did not properly narrow its scope.

414 Specific fields of legislation

Decisions on the merits of a challenge of overbreadth of legislation affecting First Amendment rights cover a wide range of subject matter, such as legislation directed to: abusive, profane, or otherwise opprobrious language; breach of the peace; cable television; courtroom news coverage; denying access to military posts; disorderly or annoying conduct; disrupting a public employee's performance of official duties; disrupting official proceedings; distribution of literature and handbills; licensing and license taxes; loyalty oaths and proof; military laws; noise abatement; obscene matters; picketing, demonstrations, and protest marches; prison control and management; public employment, including political activities, employment of subversives, subversive activities; public nudity; and miscellaneous other statutes.

-- a federal statute (18 USCA ß 1718) punishing persons for writing libelous and defamatory words on the outside of envelopes, or on postcards. Tollett v. U. S., 485 F.2d 1087 (8th Cir. 1973).

-- an ordinance making it unlawful to encumber or obstruct any street with any article or thing whatsoever. People v. Katz, 21 N.Y.2d 132, 286 N.Y.S.2d 839, 233 N.E.2d 845 (1967).

-- the provisions of the Federal Election Campaign Act of 1971 (18 USCA ß 608(b)(1)) imposing a $ 1,000 limitation on contributions by individuals and groups to any single candidate with respect to any election for federal office. Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659, 76-1 U.S. Tax Cas. (CCH) P 9189 (1976).

-- a federal statute concerning imparting false information concerning an alleged attempt to be made to commit air piracy. U. S. v. Irving, 509 F.2d 1325 (5th Cir. 1975), cert. denied, 423 U.S. 931, 96 S. Ct. 281, 46 L. Ed. 2d 259 (1975).

-- a statute extending juvenile court jurisdiction over incorrigible children. Blondheim v. State, 84 Wash. 2d 874, 529 P.2d 1096 (1975).

-- a statute punishing "terroristic threats" or acts. Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

415 Generally

The First Amendment to the Constitution of the United States forbids Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof. While technically and originally an inhibition to Congress only, the First Amendment has been made applicable to the states by passage of the Fourteenth Amendment. At a minimum, the First Amendment guarantees that the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or a religious faith or which tends to do so.

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. On the other hand, it safeguards the free exercise of each person's chosen form of religion. The interrelation of the "establishment" and "free exercise" clauses has been well summarized as follows: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." Although the two clauses overlap in certain instances, and a general harmony of purpose exists between them, the limits of permissible state accommodation to religion under the "establishment" clause are not coextensive with the noninterference mandated by the "free exercise" clause. The Free Exercise Clause has a reach of its own. A distinction between the "free exercise" and the "establishment" clauses of the First Amendment is that a violation of the former clause is predicated on coercion, while a violation of the latter clause need not be so attended.

416 Nature of right, generally; definition of "religion"

Freedom of religion is a fundamental, natural, absolute right, deeply rooted in the American constitutional system. It is a right available to all. The free exercise of religion includes the right to believe and profess whatever religious doctrine one desires. The government may not compel any affirmation of religious belief, punish the expression of religious doctrine it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. The individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. Just as the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of the mind, so also the individual's freedom to choose a creed is the counterpart of his or her right to refrain from accepting the creed established by the majority.

The Supreme Court has stated that the term "religion" has reference to one's views of one's relation to his or her Creator and to the obligations these views impose of reverence for the Creator's being and character, and of obedience to the Creator's will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. If the belief asserted is philosophical and personal rather than religious, or is merely matter of personal preference, and not one of deep religious conviction, shared by organized group, it will not be entitled to First Amendment protection; the appropriate focus is on corporate or institutional beliefs rather than on individual members' beliefs. It has been held that so-called "New Age" concepts do not implicate the Establishment Clause of the First Amendment, inasmuch as they do not demonstrate any shared or comprehensive doctrine or display any structural characteristics or formal signs associated with traditional religions, given the absence of any organization, membership, moral or behavioral obligations, comprehensive creed, particular texts, rituals, or guidelines, particular object or objects of worship, or any requirement that anyone give up religious beliefs he or she already holds.

Observation: The resolution of the question of what is a religious belief or practice protected by the Free Exercise Clause does not turn upon any judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. How-

ever, the fact that a work of art may affect someone on an emotional or spiritual level or even move him or her to tears does not imbue the work with religious content for the purpose of the Establishment Clause of the First Amendment.

"Religion" does not mean only the Christian religion. And while the Constitution distinguishes between religious and secular objections to state regulation, it makes no similar distinctions among purely secular objections based on values, morals, or other firmly held beliefs.

The constitutional provision prohibiting abridgment of religious freedom and establishment of religion is to be broadly interpreted, in the light of its history and the evils it was designed forever to suppress. The courts will, where possible, avoid any construction of legislation that will result in the legislation appearing in any manner to interfere with the free exercise and enjoyment of religious profession and worship which is protected by constitutional guarantees. The First Amendment's provision respecting freedom of religion sought to guard against any repetition of previous religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. The amendment embraces both the concepts of freedom to believe and freedom to act.

Under the Constitution, individuals cannot be excluded from the practice of law or from following any other calling simply because they belong to any religious group. And no state may exclude individuals, or the members of any particular faith, from receiving the benefits of public welfare legislation because of their faith, or lack of it.

417 "Establishment of religion," generally

The First Amendment provides, inter alia, that "Congress shall make no law respecting an establishment of religion[.]" The idea of the founding fathers, embodied in this guarantee, was that church and state be kept separate so that the legislative powers of the government could reach actions only and not opinions. The meaning of the clause is that neither a state nor the Federal Government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer one religion over another; neither can force nor influence a person to go to or remain away from a church against his or her will, or force a person to profess a belief or disbelief in any religion; and no person can be punished for entertaining or professing religious beliefs or disbeliefs, or for church attendance or nonattendance.

Observation: The Establishment Clause does not, however, exempt religious organizations from such secular governmental activity as fire inspections and building and zoning inspections.

The Establishment Clause, at the very least, prohibits the government from appearing to take a position on questions of religious belief or from making adherence to religion relevant in any way to a person's standing in the political community. Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups, and vice versa. The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs; whether there is such an effect depends upon the context in which the symbolism is used.

The First Amendment's prohibition of laws respecting an establishment of religion has been described as resting on the belief that a union of government and religion tends to destroy government and to degrade religion, and upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The First Amendment was added to the Federal Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say -- that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Observation: A state may not establish a "religion of secularism" in a sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe.

418 "Wall of aration" between church and state

The Establishment Clause has been said to have been intended to erect a "wall of separation" between church and state. As a general matter, it is surely true that the Establishment Clause prohibits the government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization. While the metaphor of a "wall" or impassable area between church and state, taken too literally, may mislead constitutional analysis, the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary impact. In short, so far as an establishment of religion is concerned, the First Amendment requires the separation of church and state to be complete and unequivocal.

Nevertheless, the Supreme Court has said that the Constitution does not require a complete separation of church and state; in fact, it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. And, like other broad constitutional concepts, the meaning of "separation" is to be ascertained in the application of the principle to specific cases.

419 ***Lemon*** test

In determining the constitutionality of a statute under the First Amendment's prohibition against a law respecting an establishment of religion, the United States Supreme Court has devised a test which requires courts to draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity. Under the *Lemon* test (named after the leading case in which it was developed), the criteria to be examined in determining whether a statute violates the Establishment Clause are:

.whether the statute has a secular legislative purpose

.whether its primary effect is one that neither advances nor inhibits religion, and

.whether it fosters excessive government entanglement with religion.

Observation: It is often difficult to discern the distinctions made by courts when applying the *Lemon* test. For instance, the Tenth Circuit Court of Appeals has held that a city seal containing four quadrants, one of which depicted a Latin or Christian cross, violated the Establishment Clause where the cross was a prominent feature of the seal, the religious significance and meaning of the cross were unmistakable, and the city's use of the seal was pervasive, notwithstanding a contention that the seal symbolized the city's unique history and heritage. On the other hand, the same court has held that statutes establishing the national motto "In God we Trust," and requiring its reproduction on United States currency, meet the requirements of the *Lemon test* for validity under the Establishment Clause.

Although a law may not "establish" a state religion, it may nevertheless be one "respecting" religion, in the sense of being a step that could lead to such establishment and hence offend the First Amendment. The *Lemon* test, requiring that a law at issue serve a secular legislative purpose, aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters, but does not require that the law's purpose be unrelated to religion, which would amount to a requirement that the government show a callous indifference to religious groups. Under the *Lemon* requirement that a law in question have the principal or primary effect of neither advancing nor inhibiting religion, a law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose; instead, for the law to have forbidden effects under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence in violation of the Establishment Clause. Under the "endorsement" test, a government-sponsored holiday display violates the Establishment Clause if, in its particular setting, the display is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

Practice guide: A court may invalidate a statute as violating the Establishment Clause on its face only where the statute is motivated wholly by some impermissible religious purpose, has as its primary effect the advancement of religion, or requires excessive entanglement between church and state.

A governmental intention to promote religion is clear when a state enacts a law to serve a religious purpose, and such an intention may be evidenced by promotion of religion in general or by the advancement of a particular religious belief. Thus, a state statute requiring a balanced treatment for "creation science" and evolution in public school instruction does not serve any identified secular purpose, including the promotion of academic freedom.

Practice guide: In every Establishment Clause case, it is necessary to reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either church or state upon the other and reality that total separation of the two is not possible. Problems presented by cases involving the First Amendment's provision respecting separation of church and state are, like many problems in constitutional law, problems of degree. In determining whether a governmental activity violates the Establishment Clause, the inquiry calls for line drawing; no fixed, per se rule can be framed.

420 Coincidence of statute with religious interests; "incidental benefit" rule

A statute primarily having a secular effect does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions. For instance, the Supreme Court has held that a federal statute cannot be invalidated as serving some impermissible religious purpose simply because some of the goals of the statute (such as a reduction of problems associated with teenage sexuality) coincide with the beliefs of certain religious organi-

zations. The happenstance that the Judeo-Christian religions oppose stealing does not mean that a state or Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. A federal statute which severely limits the use of federal funds to reimburse the cost of abortions under the Federal Medicaid program does not run afoul of the Establishment Clause of the First Amendment, notwithstanding that funding restrictions therein may coincide with the religious tenets of the Roman Catholic Church.

A law protecting a valid secular interest is not invalid as one "respecting an establishment of religion" merely because it also incidentally benefits one or more, or all, religions, or because it incidentally enhances the capability of religion or religious institutions to survive in society. In other words, government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to the Establishment Clause just because the sectarian institutions may also receive an attenuated financial benefit.

421 Requirement of governmental neutrality

Whatever else the Establishment Clause may mean, the Supreme Court has said it certainly means at the very least that the government may not demonstrate a preference for one particular sect or creed, including a preference for Christianity over other religions, inasmuch as the United States' heritage of official discrimination against nonChristians has no place in the jurisprudence of the Establishment Clause. The Court has said that a proper respect for both the free exercise and Establishment Clauses compels the state to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents. The rules to the effect that the government may not prefer one religion over another, or religion over nonreligion, but that laws having valid secular objectives are not invalid merely because they confer an incidental benefit on one religion but not another, or on religion generally, has led the Supreme Court to conclude that under the Establishment Clause the proper relationship of government vis--vis religion and religious institutions in this country is not one of hostility, but neutrality, and that the neutrality which is required need not stem from a callous indifference to religion, but even may at times be benevolent.

In commanding neutrality, the religion clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice; the Establishment Clause allows neutrality which permits religious exercise without sponsorship. Under the establishment of religion clause of the First Amendment, government "neutrality" in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes.

A regulation neutral on its face may, in its application, nevertheless offend the constitutional requirement of governmental neutrality if it unduly burdens the free exercise of religion. Although the establishment of religion clause of the First Amendment forbids subtle departures from government neutrality, "religious gerrymanders," as well as obvious abuses, nevertheless a claimant alleging a "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn. Under the rule that a statute's principal or primary effect must be one that neither advances nor inhibits religion, in order to be valid under the First Amendment's Establishment Clause, aid normally may be thought to have a primary effect of advancing religion when it flows through an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

422 Excessive entanglement rule

The fact that the interests of government and religion sometimes incidentally coincide, and the philosophy that the Establishment Clause does not require the government to adopt an attitude of active antipathy towards religion, but instead permits both to exist without hostility toward one another, has led the Supreme Court to adopt the view that, under the Establishment Clause, the government may "accommodate" religion and religious institutions as long as the end result of the accommodation does not excessively entangle the government in the affairs of religion, nor result in government surveillance of religious activities. The "excessive entanglement" test is inescapably one of degree; separation of church and state cannot mean the absence of all contact, since the complexities of modern life inevitably produce some contact. The government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes unduly into the affairs of the other. But while some involvement and entanglement between government and religion is inevitable, lines must be drawn. The principle that the government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.

423 Use by religious organizations of civil courts

Although the Supreme Court has found no violation of the Establishment Clause in the use of civil courts by religious organizations to decide disputes, particularly property disputes, civil courts generally will not interfere with respect to purely ecclesiastical or spiritual features of a church or religious society. Moreover, even in resolving church property

disputes, the Supreme Court has pointed out that the First Amendment severely circumscribes the role that civil courts may play, since there is a substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. The Court has stated that the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice, and requires the civil courts to defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization, but subject to these limitations the First Amendment does not dictate that a state must follow a particular method of resolving church property disputes. [n86]

To permit civil courts to probe deeply enough into the allocation of power within a hierarchical church to decide religious law governing church polity violates the First Amendment in much the same manner as civil determination of religious doctrine; where resolution of disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding in their application to the religious issues of doctrine or polity before them. A state is constitutionally entitled to adopt neutral principles of law, such as examination of the language of deeds, local church charters, state statutes, and provisions of the constitution of the general church, as a means of adjudicating church property disputes, but in undertaking such an examination the civil court must take special care to scrutinize the documents in purely secular terms, and if a deed, a corporate charter, or a constitution of the general church incorporates religious concepts in a provision relating to ownership of property, so that interpretation of the instruments of ownership would require a civil court to resolve a religious controversy, the court must defer to resolution of the doctrinal issue by the authoritative ecclesiastical body. In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters; and when such choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Conversely, absent fraud or collusion, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical policy, but must accept such decisions as binding on them in their application to the religious issue of doctrine or polity before them. And, although there are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes, nevertheless the First and Fourteenth Amendments do not prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action involving purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, employment discrimination not based on religion, and statutory violations are alleged.

424 "Free exercise" of religion; generally

The First Amendment provides, inter alia, that "Congress shall make no law ... prohibiting the free exercise" of religion. Though freedom to act in the implementation of one's beliefs may sometimes be restricted, this clause has been interpreted by the Supreme Court to mean that the government is prohibited from interfering with or attempting to regulate any citizen's religious beliefs, from coercing a citizen to affirm beliefs repugnant to his or her religion or conscience, and from directly penalizing or discriminating against a citizen for holding beliefs contrary to those held by anyone else.

Practice guide: To prevail on a free exercise claim, a plaintiff must first show that some state action sufficiently burdened his or her exercise of religion.

Only beliefs rooted in religion are protected by the Free Exercise Clause of the First Amendment, which, by its terms, gives special protection to the exercise of religion. Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. However, the Free Exercise Clause does not protect purely secular views or personal preferences.

The Free Exercise Clause of the First Amendment constitutes an absolute prohibition against governmental regulation of religious beliefs. Thus, the Supreme Court has said that freedom of conscience and freedom to adhere to such religious organization or form of worship as an individual may choose cannot be restricted by law.

The Constitution places beyond the reach of the law the affirmative pursuit of one's convictions about the ultimate mystery of the universe and humanity's relation to it. Courts, no more than constitutions, can intrude into the consciences of persons or compel them to believe contrary to their faith, or think contrary to their convictions. The Free Exercise

Clause withdraws from legislative power, both state and federal, the exertion of any restraint on the free exercise of religion, since the clause's purpose was to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority; hence, it is necessary in a free exercise case for one to show the coercive effect of an enactment as it operates against him or her in the practice of a religion. The door of the Free Exercise Clause is tightly closed against any governmental regulation of religious beliefs as such.

At the same time, the Court has said that location of the line between unconstitutional prohibitions on the free exercise of religion and legitimate conduct by the government of its own affairs cannot depend on measuring the effects of governmental action on a religious objector's spiritual development. Thus, under the Free Exercise Clause, the freedom of individual belief is absolute, but the freedom of individual conduct is not; and the Free Exercise Clause does not require the government to conduct its internal affairs in ways that comport with the religious beliefs of particular citizens.

The Supreme Court has also pointed out that the Free Exercise Clause extends to religious organizations the same right to be free from governmental coercion as is extended to individuals.

It is clear that the Free Exercise Clause does not merely extend to the protection of orthodox religious beliefs and practices, but protects unorthodox religious beliefs and most practices, and the right to hold no religious belief, as well; and there is no federal constitutional prohibition against persons worshipping God at any time or at any place they may see fit. Moreover, the right to espouse any religious faith or any political cause short of one dedicated to the overthrow of the government by force carries with it the cognate right to engage as its champion in the proselytization of followers or converts to the favored cause or faith. He or she who makes a profession of evangelism is not in a less preferred position, as respects the protection afforded by the First Amendment, than the casual religious worker. A state may not, by statute, wholly deny the right to preach or to disseminate religious views. And it is not in the competence of a court under our constitutional system to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings, sermons being as much a part of a religious service as prayer.

425 Governmental protection of free exercise of religion

Congress can enact legislation under the enforcement power of the Fourteenth Amendment protecting the constitutional right to the free exercise of religion.

426 Incidental detriment rule

The Supreme Court has generally followed the rule that a law advancing a legitimate governmental interest is not necessarily invalid as one interfering with the "free exercise" of religion merely because it also incidentally has a detrimental effect on the adherents of one or more religions. But laws having an adverse effect on those whose religion requires strict Sabbath observance have been invalidated where the Court found no strong justifying state interest. The Free Exercise of Religion Clause of the First Amendment prohibits misuse of secular governmental programs to impede the observance of one or all religions or to discriminate invidiously between religions, even though the burden may be characterized as being only indirect. And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise of Religion Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the government's valid aims.

Observation: When the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or when it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his or her behavior and violate his or her beliefs, a burden upon religion exists; while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

427 Permissible governmental regulation of religious activities

Not all burdens on religion are unconstitutional; the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

Observation: When claims of encroachment upon the free exercise of religion are asserted by members of a religious faith because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, their claims do not rest on a religious basis.

To affirm that the freedom to follow conscience has no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. The Free Exercise Clause does not render the government powerless to regulate the actions of persons or organizations motivated by religious beliefs. Thus, the government has the inherent police power to regulate religious activities in a reasonable and nondiscriminatory manner, in order to protect the safety, peace, good order, and comfort of all members of society. A law that is reli-

gion-neutral and generally applicable does not violate the Free Exercise Clause even if it incidentally affects religious practice.

Freedom and order are compatible; therefore, the First Amendment does not prevent reasonable nondiscriminatory regulations by governmental authority seeking merely to preserve peace, order, and tranquillity without depriving any group of the right to free exercise of religion. While the First Amendment freedom to exercise religion grants absolute protection to a person's freedom to believe and profess whatever religious doctrines the person desires, a person's conduct pursuant to his or her religious beliefs remains subject to regulation for the protection of society, and a person's freedom to act must have appropriate definition to preserve enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, to unduly infringe the protected freedom. A state may not wholly deny the right to preach or to disseminate religious views but may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon, and may in other respects safeguard the peace, good order, and comfort of the community without unconstitutionally invading the liberties protected by the First and Fourteenth Amendments.

Observation: The mere fact that a person's religious practice is burdened by a governmental program does not mean that an exemption accommodating his or her practice must be granted, since the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest; however, only those interests of the highest order can overbalance legitimate claims to the free exercise of religion.

Although the power to regulate religious activities for the general welfare of the public cannot be denied to the government, regulation of religious activities may not be exercised in an arbitrary fashion, and cannot be permitted to degenerate into outright prohibition of such activities.

Regulation and suppression are not the same, and any infringement of the free exercise of religion, beyond the mere regulation of religious activities justified by the government's duty to keep peace and good order in a community, can be tolerated only when the infringement is necessary to serve a compelling state interest of sufficient magnitude.

As examples of the preceding principles, a state university has a right to exclude even First Amendment activities that violate reasonable campus rules or that substantially interfere with the opportunity of other students to obtain an education. On the other hand, public employment is among the benefits that cannot be conditioned upon a person's willingness to violate a cardinal principle of his or her religious faith.

428 Protection of children

While constitutional protection extends to many of the methods of religious training and indoctrination of children, the government has a legitimate interest in seeing to it that overzealous adults not be permitted to make religious martyrs out of their children, and therefore the government is permitted, under the Free Exercise Clause, to go further in regulating the religious activities of children than it is permitted to go in regulating the same actions when performed by adults. While parents may be free to become martyrs themselves, it does not follow that they are free, in identical circumstances, and in the name of religion, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

429 Religious beliefs as defense to crimes or torts

The free exercise of religion does not include the right to commit crimes or torts in the name of religion. The courts have consistently adhered to the view that where the government has designated certain activities as criminal or tortious, and where its designation is otherwise consistent with the Constitution, then it is no defense to a criminal charge or to a commission of a civil wrong to say that the criminal or tortious act was motivated by religious beliefs. A wrong practiced in the name of religion is not protected by the Constitution providing for the free exercise and enjoyment of religious profession and worship, and conscientious scruples do not relieve the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. Accordingly, the Supreme Court has stated the general principle that the punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation cannot be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance. Specific examples include cases involving polygamy; mail fraud; violation of various provisions of the Military Selective Service Act (such as a refusal to register for the draft or counseling and aiding and abetting another to refuse to register for the military draft); violation of the Federal Food, Drug, and Cosmetic Act; antisnake-handling statutes; and narcotic or psychedelic drug offenses.

Observation: Although the states may make a nondiscriminatory religious practice exemption to a drug law, such an exemption is not constitutionally required. Thus, a state may, consistent with the free exercise clause, constitutionally deny claimants unemployment compensation benefits on the ground of misconduct for dismissal from drug counseling positions resulting from their sacramental use of the drug peyote at a ceremony of the Native American church, where the ingestion of peyote is illegal under state criminal laws.

Despite the foregoing, however, the Supreme Court has upheld reversal of convictions of members of the Amish faith for violating a state's compulsory school attendance law requiring children to attend school until the age of 16.

430 Standing to challenge legislation or activities

The Supreme Court has over the years gravitated gradually towards the use of a more relaxed standard to determine whether a person has standing to bring an action challenging the constitutionality of a statute on the ground that it either is one respecting the establishment of a religion, or is one inhibiting the free exercise thereof. While it remains clear that a person has standing to bring such an action where the statute constitutes a direct violation of his or his children's rights under the religion clauses, the Court has also permitted taxpayers to bring such suits, even where they could not be said to have had a direct personal stake in the outcome of the suit. The requirements for standing to challenge state action under the "establishment" clause, unlike those relating to the "free exercise" clause, do not include proof that particular religious freedoms have been infringed upon.

Observation: Purely secular views or personal preferences will not support a free exercise clause claim. For purposes of a free exercise clause claim, courts must be cautious in attempting to separate real from fictitious religious beliefs.

Since the "establishment of religion" clause of the First Amendment constitutes a specific limitation upon the congressional spending power, a federal taxpayer has standing to invoke federal judicial power to challenge federal taxing or spending statutes.

Practice guide: In order to have standing in a federal court to challenge the constitutionality of a federal spending program, a federal taxpayer must be prepared to establish a nexus between his or her status as a taxpayer and the precise nature of the constitutional infringement alleged, and must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power, and not simply that the enactment is generally beyond the powers delegated to Congress.

A church organized to minister primarily to the spiritual and religious needs of homosexuals was a bona fide religion and was entitled to protection of the establishment clause and had standing to contest the ban imposed by prison officials on religious services for inmates with homosexual proclivities.

431 State constitutions

Most, if not all, state constitutions contain general guarantees ensuring every person of the right to worship according to the dictates of his or her own conscience. Some minor differences exist in the several state constitutions on the subject of the freedom of religion, although, in general, perfect equality before the law is conceded to all shades of religious belief. Cases involving religious freedom under the Federal Constitution, while not controlling on cases arising only under a state constitution, should receive careful consideration in construing a state constitution.

432 Particular applications; aid to churches; generally

The application to particular factual situations of the general rules relating to the establishment and free exercise provisions of the First Amendment, simplistic as they appear to be in the abstract, has involved a complex pattern of turns and twists of legal reasoning, cutting across almost all facets of human life. In every instance, the courts have engaged in a balancing and sifting of interests.When the Constitution and Bill of Rights were adopted, and for some time thereafter, governments often gave funds and property to churches. Today, however, most state constitutions specifically prohibit such aid to churches. With regard to the United States Constitution, the United States Supreme Court has specifically held that the establishment clause of the First Amendment prohibits by its terms taxing and spending in aid of religion. The Supreme Court has also held that when the government directs that a subsidy be given exclusively to religious organizations which is not required by the free exercise clause and which either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, it provides an unjustifiable award of assistance to a religious organization. On the other hand, religious institutions are not disabled by the establishment clause from participating in publicly sponsored social welfare programs. Thus, a law providing for grants to both religious and secular organizations that provide secular services to the public (such as counseling on teenage sexuality) is not unconstitutional where potential grantees are required to disclose exactly what services they intend to provide and how they will be provided, because a mechanism is thereby created whereby the government can police

grants to ensure that federal funds are not being used for impermissible purposes. The Court has also held that the First Amendment does not preclude a state from extending assistance under a state vocational rehabilitation assistance program to a blind person who happens to have chosen to study at a Christian college to become a pastor, missionary, or youth director.

433 Aid to hospitals or other charitable institutions operated by religious groups

Financial aid provided by the government to hospitals for the treatment and cure of impoverished patients does not violate the establishment clause of the First Amendment simply because the hospital happens to be operated by a religious organization, so long as the hospitals serve all regardless of creed and there is no effort made to advance the particular religion. Similarly, the lease of a city-county hospital to a religious organization for operation has been held to be not unconstitutional. And a state statute that gave tax-exempt status to bonds that would be used to facilitate the building of hospitals was held not to contravene the First Amendment merely because some of the hospitals that would be so engaged in the statutory scheme had religious affiliations. On the other hand, some state constitutions are so worded as to ban public aid to all sectarian or denominational institutions, and courts in these jurisdictions have invalidated public aid to hospitals and homeless shelters operated by religious groups. However, a number of other state courts have sustained the constitutionality of public payments to institutions operated by religious groups for the custody of orphans, children committed by juvenile courts, and other children in need.

There is very little judicial authority on whether public funds can be given to welfare institutions operated by religious groups. A state court has refused to allow a public body to contribute to a local Community Chest where this charity passed on some of the funds to religious organizations doing charitable work. Another court has held that a township trustee's practice of providing emergency shelter to the homeless poor by reimbursing private religious mission shelters, which required attendance at religious service as a condition of being given shelter, violated the free exercise and establishment clauses of the United States and Indiana Constitutions, notwithstanding the trustee's claim that there was no "state action" because the missions, rather than the trustee, imposed the religious service requirement. And Louisiana's constitution has been interpreted to ban aid by the state, but to permit aid by local governments to charitable and benevolent institutions.

434 Education; access to school buildings and facilities

In the area of education, the courts have had to consider whether the establishment clause has been violated by various forms of public aid to church-related schools such as: transportation of students, tuition payments, and the form of tuition grants, reimbursements, or tax credits to parents of parochial school children commonly known as "parochaid;" general state aid to private colleges, including religiously affiliated institutions; furnishing or lending textbooks, or other instructional material or equipment; "released time" or "shared time" programs for religious instruction; teachers' salaries or supplements; sending public school teachers into parochial schools to teach remedial classes required by the government; reimbursement for the cost of secular educational services, or for state-mandated tests; and grants for maintenance and repair of school facilities and equipment. With regard to all of these issues, the general rule now (but not always previously) followed is that government programs made available to a broad class of citizens defined in a religion-neutral fashion may be used by individuals receiving them in a religious setting, and a program making such benefits available does not thereby violate the establishment clause.

The Supreme Court has held that a federal statute requiring that schools which create a limited open forum for noncurriculum-related student groups must provide equal access to student religious groups did not violate the establishment clause, noting that the prohibition in the statute against discrimination against student groups on the basis of political, philosophical, or other speech, as well as religious speech, showed a secular purpose for the statute. The Court has also held,however, that a program under which a city used federal funds received under Title I of the Elementary and Secondary Education Act to pay salaries of public school employees who taught in parochial schools in the city did not violate the establishment clause since certain precautions were taken and criteria met to assure that the employees did not inculcate the students with any religious beliefs and that there would be no excessive entanglement between government and religious authority.

Other topics or problems which have been litigated include: courses of instruction such as the theory of evolution, creationism, secular humanism, or sex education; Bible reading or distribution; discussions in the classroom by teachers of their personal religious beliefs; prayers; a statute requiring the posting of the Ten Commandments in public school classrooms; religious hymns; use of the Bible as a textbook, or use of a textbook based on the Bible; credit for Bible study away from public school; employment of ministers, nuns, and other religious personnel, as teachers; wearing of religious garb by teachers; use of school property as a place of worship or for religious purposes; use of a sectarian

building for public school purposes, selection of school mascots, and the display of religious structures or symbols on school property. Courts have also considered whether compulsory school attendance laws, requirement of the flag salute and pledge of allegiance, and compulsory vaccination or immunization regulations violate religious beliefs.The Supreme Court has also considered whether various forms of direct public assistance to students who attend religious schools is permissible under the Constitution. The Court has held, for example, that the establishment clause does not lay down an absolute barrier to the placing of a public employee in sectarian schools; the general rule regarding the avoidance of constitutional issues has no application where lower courts have addressed only constitutional issues; and providing the services of an interpreter under the Individuals with Disabilities Act (IDEA) to a student attending a Catholic high school does not violate the establishment clause.

Articles attacking religion which were published in college newspapers partially supported by public funds were held not to be in violation of the establishment clause of the First Amendment where publication of the articles was not systematic, and was not done with the intent to break down religious beliefs or to exclude discussion of the other side of the issues raised.

A cadet at a military school cannot be expelled for refusing to attend a church not of his faith. Though the expenditure of public funds was not involved, the Supreme Court has also held that a state statute creating a special school district to serve a village with boundaries drawn to include only property owned and inhabited by practitioners of a strict form of Judaism departed from the First Amendment requirement that the state pursue a course of neutrality toward religion by delegating the state's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.

435 Use of public places or property, generally

Compliance with the First Amendment's establishment clause is a state interest sufficiently compelling to justify content-based restrictions on religious speech on public property. Thus, the government need not permit all forms of speech on property that it owns and controls. Whether laws or regulations inhibiting the totally free and unrestrained exercise of religion in public places are constitutional depends in large part on whether the restraints that have been imposed constitute legitimate exercises of the police powers of the states or municipalities.

Observation: Where the government is acting as a proprietor managing its internal operations (as in operating an airport) rather than acting as a lawmaker with the power to regulate or license, its action limiting protected speech will not be subjected to the heightened review to which its actions as a lawmaker may be subjected.

Where the courts have concluded that the restraints were valid, nondiscriminatory rules established for the general welfare, they have found no violation of the constitutional right to the free exercise of religion; but where they have concluded that the restraints themselves were arbitrary, or were exercised in an arbitrary manner, the courts have held such regulations violative of the First Amendment.

Under the "forum-based" approach for assessing restrictions that the government seeks to place on the use of its own property, the regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny; such regulations survive only if they are narrowly drawn to achieve a compelling state interest. On the other hand, a regulation limiting expressive activity conducted on property that is not traditionally available for public expression or is not designated as a public forum need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity because of a disagreement with the speaker's view.

Such rules have been applied with respect to the use of such public places as streets, parks, and airports.

With respect to limited-access or semipublic places, such as company towns and public housing projects, the courts have held that religious activities in such places cannot be unduly restricted without violating the religion clauses of the First Amendment. In this connection, criminal trespass statutes, and statutes or ordinances regulating breach of the peace and disorderly conduct, sometimes raise questions involving the constitutionally protected right of the free exercise of religion. And where a state university made its facilities generally available for the activities of registered student groups, its closing of the facilities to a registered student group desiring to use the facilities for religious worship and discussion was held to violate the fundamental principle that a state regulation of speech should be content neutral.

436 Erection, maintenance, or display of religious symbols on public property

In considering whether the erection, maintenance, or display of religious structures or symbols on public property constitutes a violation of religious freedom, the Supreme Court has said that, to withstand the strictures of the establishment clause, state action asserted to violate that clause must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Thus, any governmental purpose to advance or inhibit religion generally, or any sect particularly, through the erection, maintenance, or display of religious structures or symbols on public property constitutes a violation of religious freedom. As an example, a cr che displayed on the grand staircase of a county courthouse and surrounded by traditional Christmas greens was held to have the effect of endorsing a patently Christian message and to violate the establishment clause, even though it was the setting for the county's annual Christmas carol program and contained a sign disclosing ownership by a Roman Catholic organization. Similar results have been obtained in cases involving the erection of menorahs in public places. In the absence of such a purpose, however, the erection, maintenance, or display of religious structures or symbols on public property does not violate the establishment clause. The above rules have been applied to such public property as schools, parks, streets or boulevards, courthouses, a state orphans' home, city fairground property, and even to the Ellipse adjacent to the White House; and to such structures or symbols as a chapel, a cross, a cr che depicting the Nativity scene, a granite monolith, and a statue of St. Francis Xavier. In some of the cases, the courts placed emphasis on the fact that the erection, maintenance, or display of religious structures or symbols on public property involved no expenditure of public funds. And it may also be noted that in the determination of various questions essential to a decision on the propriety of the erection, maintenance, or display of religious symbols on public property, the temporariness of such a display is not a factor militating in favor of the legality of such a display a showing that it was of a temporary as opposed to a permanent character.

Observation: In some decisions prior to 1990, the Supreme Court appeared to place more emphasis on a rule that required the government not to permit religious symbols on public property even though nonreligious symbols could be permitted thereon. However, in more recent years, the Supreme Court has placed much greater emphasis on the rule that the government should maintain, with regard to public property, a strict neutrality towards religion and religious symbols in general. If privately sponsored nonreligious symbols or speech are permitted on public property, then privately sponsored religious symbols or speech should be permitted. Thus, a state does not violate the establishment clause of the First Amendment by permitting a private party to display an unattended cross on the grounds of the state capitol, where the state did not sponsor the organization's expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

437 Distribution of religious tracts or pamphlets

As a general matter, peaceful picketing and leafleting are expressive activities involving "speech" protected by the First Amendment. Colporteuring, or the distribution of religious tracts, pamphlets, or books, has enjoyed consistent protection by the Supreme Court over the years. As the cases demonstrate, the court has invalidated most attempts by states or municipalities to limit the practice or to exact license fees from colporteurs on the ground that such attempts constitute unwarranted restrictions on the free exercise of religion, the sole exceptions being those few regulations the court felt were justified under the state's police power.

438 Health matters; medical treatment; right-to-die laws

The courts have approved compulsory vaccination or immunization laws against freedom-of-religion objections. Abortion notification procedures to parents of a minor pregnant female, regulation of health devices, and water purification (such as chlorination) and medication-fortification (such as fluoridation) measures have been held not to constitute a violation of the guarantee of freedom of religion. A requirement that entering university students submit to chest X-rays for the purpose of detection and control of tuberculosis has been held not to violate the right of free exercise of religion when enforced against a person with religious scruples against such an examination.

It is clear from the cases that the First Amendment's religion clauses do not allow parents to impose their own religious views on their children to the extent of exposing them, by withholding life-saving medical treatment or assistance, to communicable diseases, ill health, or death. Thus, it has been held that the free exercise of religion rights of Jehovah's Witnesses were not violated by court-ordered life-saving medical assistance (such as blood transfusions) for their children in pursuance of a state statute authorizing medical treatment for neglected children.

The Supreme Court has ruled that there is no federal constitutional "right-to-die," nor is there any federal constitutional right to physician-assisted suicide for terminally ill patients.

The Supreme Court has held that ordinances intended to prohibit the ritual slaughter of animals violated the free exercise clause because they were not of general applicability despite a claim that they were related to a city's interest in

public health which supposedly was threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. The Court held that the ordinances were underinclusive with respect to that interest as they did not deal with the consumption of meat or the disposal of carcasses by hunters and fishers.

439 Judicial and legislative proceedings

With respect to jury service, it has been held that the exclusion of a person because of a lack of belief in a Supreme Being is in violation of the Federal Constitution, and that a juror cannot constitutionally be required to demonstrate a belief in God as a condition to serving as a juror. But a person may in effect be exempted from jury service on the ground of his or her religious belief, and the exclusion from jury service of such classes as ministers is of long standing and not uncommon in the United States. Competency to appear and testify as a witness may not be made dependent upon religious belief, nor may the credibility of a witness be impeached by interrogation as to religious belief, although there is some contrary authority on this point. With regard to matters of courtroom decorum or procedures, it has been held not to be a violation of First Amendment religious rights for a judge to insist on a defendant's rising out of respect for institutionalized courts, but it may be a violation to require a priest who was also a lawyer to remove his clerical garb while in court representing a defendant in a criminal trial. On the other hand, it has been held that a person could not be cited for contempt for refusing to remove his headgear in court for religious reasons.

As a general rule, civil courts assert a want of jurisdiction to review or determine controversies relating to ecclesiastical practices, and even in cases involving property rights of churches or religious societies, the First Amendment severely limits the role that civil courts may play.

A requirement in judgments that defendant juvenile delinquents attend Sunday school and church each Sunday for a period of one year has been held to violate their Constitutional guarantee of freedom of religion.

440 Licenses and permits, generally

Convictions for using public streets or parks for religious purposes, such as meetings, parades, solicitation of contributions, or distribution of literature, without obtaining a permit as required by state or local law, have been sustained as against claims of violation of First Amendment rights as to free exercise of religion, where the courts have concluded that the regulations were reasonable, specific, and necessary for the public good, and overturned where the courts have found that the authorities specified in the regulation had arbitrary or unlimited power to reject requests for such permits, or where such power was derived only from local practice not defined by any standards or limitations.

An ordinance imposing a flat license tax, not a mere nominal fee, for the privilege of canvassing or soliciting within a municipality is, when applied to religious colporteurs engaged in the dissemination of their religious beliefs through the sale of books and pamphlets by solicitation from house to house, an unconstitutional invasion of the right of freedom of religion. And the Supreme Court has held that the constitutional guarantee of religious freedom precludes the exacting of a book agent's license fee from a distributor of religious literature as a means of spreading the distributor's religious beliefs, although the distributor's activities are confined to his home town and he depends for his livelihood on contributions requested in return for the literature distributed.

It is violative of the establishment clause to give a church "veto power" over the issuance of licenses or permits to secular businesses of which it disapproves. Thus, where a restaurant, which had been refused the issuance of a liquor license by a city solely because of opposition filed by a nearby church, brought suit challenging the constitutionality of the state statute governing the issuance of liquor licenses within 500 feet of a church or school, the Supreme Court held that the statute, which vested in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school, violated the establishment clause of the First Amendment.

A charitable solicitation statute which imposes certain registration and reporting requirements only upon those religious organizations that solicit more than 50 percent of their funds from nonmembers discriminates against such organizations in violation of the establishment clause of the First Amendment.

441 Marriage, divorce, and other domestic relations

The Supreme Court has held that the state has a legitimate and compelling interest in protecting the institution of marriage, and that it is permissible, notwithstanding the free exercise clause of the First Amendment, to prohibit and make criminal the practice of bigamy and polygamy, even where such practices are engaged in because of religious beliefs. It may be noted, too, that incestuous marriages are generally forbidden in this country and in Western civilization generally, such prohibition being based in large part on religious dogma. With regard to adoption, it has long been the practice of the courts to consider the spiritual welfare of the child and the differences of religious faith as between the child and

the prospective adoptive parent or parents, and in some jurisdictions the adoption statutes expressly require the religious matching of the parties. However, in recent years, such considerations and statutes have often come under increasing attack as violative of the First Amendment provisions prohibiting the establishment of religion and guaranteeing the free exercise of religion, and as a result, religious matching requirements sometimes have been either struck down or construed very narrowly and strictly to avoid unconstitutionality in a particular case. Divorce is entirely a creature of statute in the United States, and the power of the legislatures of the several states over the subject of marriage as a civil status and its dissolution is unlimited and supreme except as restricted by the Constitution. For this reason, it has been held that a court had authority to grant a divorce on statutory grounds despite the wife's contention that such action contravened the religious vows and oaths taken by her and her husband and thus violated her right to the free exercise of religion. However, it has also been held that a state domestic relations act, which allowed a master in charge of a hearing to invite the assistance of representatives of religious denominations to which the parties belong as an aid in effecting a reconciliation of the parties, violated the First Amendment because tax money of the state was utilized to aid or spread religious faith.

In determining the custody of children upon dissolution of a marriage, the courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs; nor will the courts pass upon the relative merits of various religions, and controlling effect will be given to the temporal welfare of the child, except that religious considerations may well be bound up in the issue of temporal welfare and, if so, may properly be considered by the courts. Statutes in some states expressly provide that when practicable a judge must award custody of a child only to persons of the same religion; in at least one instance, such a statute has expressly been declared to be constitutional, as against the claim of violation of First Amendment religious freedom. But a pre-divorce settlement stipulation, incorporated by the court in the final divorce decree, that the child be reared in a specified religion, has been held to be void as an interference with or prescription of religious beliefs or training contrary to the First Amendment.

442 Military service or instruction; conscientious objection

When evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. The religion clauses of the First Amendment neither prohibit nor compel universal military conscription. Thus, it does not violate the free exercise clause to draft all otherwise eligible persons into the military in spite of the fact that some might have religious scruples against military service. On the other hand, Congress may grant statutory exemptions to certain groups, such as ministers, theological students, or conscientious objectors, without violating the establishment clause. It is likewise constitutional for Congress to exempt persons having conscientious objections to participation in all wars without exempting those objecting only to particular wars. The First Amendment religious rights of students who voluntarily enroll at a state university, and who are aware that one condition of continued enrollment is their participation in a course of military instruction, are not violated by such a requirement.

However, the establishment clause was held violated by regulations of the various Service Academies requiring that all cadets attend church or chapel services.

The granting of citizenship to aliens may not be conditioned upon a requirement that such persons must first agree, in violation of their sincerely held religious views, to take an oath that they will perform military service if called upon to do so. On the other hand, the denial of educational benefits under the Veterans' Educational and Training Act to conscientious objectors who performed required alternative civilian service does not violate such conscientious objectors' First Amendment rights of free exercise of religion.

443 Prison inmates

A prisoner in a penal institution retains all the rights of ordinary citizens (except those expressly, or by necessary implication, taken from him or her by law), including all those First Amendment rights that are not inconsistent with his or her status as a prisoner or with the legitimate penological objectives of the corrections system. Accordingly, it has been held by the Supreme Court that reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments, without fear or penalty. However, like all other fundamental constitutional rights, the practice of religion is subject to supervision and some limitation in a prison. Employment of chaplains in federal prisons by the United States does not violate the establishment clause.

444 Private employment or labor

Religious groups are generally not immune from all governmental regulation of their employment relationships, or from court enforcement of those laws. Thus, the Fair Labor Standards Act applies to religious entities, and application of the Fair Labor Standards Act to "associates" (i.e., employees) of a religious foundation's commercial enterprises does not

violate the rights of the "associates" to freely exercise their religion or the right of the foundation to be free of excessive governmental entanglement in its affairs. And the First Amendment does not prohibit the application, at least in some of their aspects, of either the Civil Rights Act of 1964 or the Age Discrimination in Employment Act of 1967 to the employment of persons by religious entities. On the other hand, in view of the fact that the National Labor Relations Board's exercise of jurisdiction over lay teachers in church-operated schools would implicate the guarantees of the religion clauses of the First Amendment, and in view of the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, the Supreme Court has held that the National Labor Relations Act does not authorize the Board to exercise jurisdiction over the lay faculty members at church-operated schools.

The First Amendment (as well as the Civil Rights Act of 1964) precludes the imposition of economic or employment penalties on those who celebrate their Sabbath on Saturday rather than Sunday, unless the state can justify such penalties by showing a compelling state interest in their imposition. Thus, the denial of unemployment compensation benefits to a claimant who imposes a time restriction on his or her availability for work because of religious beliefs constitutes an improper restriction of the free exercise of religion. The firing of an employee, as required by a union shop clause, for failure to pay union dues where such failure was caused by the employee's religious convictions, does not constitute denial of the right to the free exercise of religion. And a denial of unemployment compensation benefits to a claimant who terminated his job because his religious beliefs forbade participation new job duties assigned to him violates the First Amendment right to free exercise of religion, at least where the state has not shown a compelling interest in denying benefits and where the granting of benefits will not foster the establishment of religion.

445 Property matters; zoning; condemnation

The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes, since there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Since the state cannot establish churches, condemn land therefor, or compel church attendance, a church does not occupy the vantage point of a school and cannot have recourse to condemnation, and the right of a church to acquire property rests on no higher ground than that of any other citizen. In cases involving contemplated condemnation of church property for a public purpose, the church is entitled to a hearing at which evidence should be presented and considered as to the relative interest of the condemnor as against that of the church under its rights of free exercise of religion.

Zoning regulations affecting church property have generally been held not to constitute a deprivation of religious freedom.

446 Public office or employment

The United States Constitution expressly provides that no religious test shall ever be required as a qualification to any office or public trust under the United States, and there are similar provisions in most state constitutions.Freedom of religion, under the Federal Constitution, has been considered not violated by an oath of allegiance or loyalty required of public officers and employees, including teachers. And although one cannot be excluded from the practice of law simply because he or she belongs to any particular religious group, insistence of the state that any officer who was charged with the administration of justice should be required to take an oath to support the constitution of the state, which oath, according to the state's interpretation, included an indication of willingness to perform military service, has been held not to violate principles of religious freedom.

447 Sabbath or religious holiday observance; Sunday closing or "blue" laws

A state Sunday closing law does not violate the constitutional prohibition against laws respecting an establishment of religion where the present purpose and effect of the statute is not to aid religion, but to set aside a day of rest and recreation; and this is true even where the origin of the statute is unquestionably religious in nature and purpose. Similarly, legislation forbidding the selling or giving away of intoxicating liquor on Sunday and the keeping open on Sunday of places for the sale of liquor does not constitute an improper interference with religious freedom, as to those persons whose religion does not make Sunday a day of worship.

448 Taxation of, or on behalf of, religion; exemptions

No tax in any amount can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. With regard to the imposition of taxes on religion or religious activities, the Supreme Court has said that the rule that the free exercise clause prevents imposition of a tax on a religious organization applies only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs. It is not unconstitutional under the free exercise clause for governments to levy taxes on "business" property owned or operated by religious organizations.

The payment of social security taxes and the receipt of social security benefits has been held to violate Amish religious beliefs as to their obligation to provide for their fellow members because of the assistance contemplated by the social security system, and thus compulsory participation in the social security system interferes with the Amish's free exercise rights. But the free exercise clause is not violated by laws which tax the income derived by persons from their religious activities.

It is not violative of the religion clauses of the First Amendment of the United States Constitution for a state to grant property tax exemptions to religious organizations where the legislative purpose is not aimed at establishing, sponsoring, or supporting religion, and the effect of the exemptions is not an excessive government entanglement with religion. Similarly, some sales and use tax exemptions for religious institutions have been upheld. However, the free exercise clause does not preclude a state from eliminating altogether its exemption from taxation for religious publications in the absence of evidence that payment of the sales tax by subscribers to religious periodicals or purchases of religious books would offend religious beliefs or inhibit religious activity.

With regard to the charitable contribution deduction, the primary effect of the provision of the Internal Revenue Code governing charitable deductions -- encouraging gifts to charitable entities, including but not limited to religious organizations -- is neither to advance nor inhibit religion, and thus does not violate the establishment clause of the First Amendment. A requirement that taxpayers disclose the beneficiaries of charitable donations deducted from their gross income, although an indirect burden on the exercise of religion, does not make unlawful the practice of religion itself, and therefore is constitutional.

Under the First Amendment, the Internal Revenue Service can reject otherwise valid claims of religious benefit for charitable deduction purposes only on the ground that the taxpayers' alleged beliefs are not sincerely held, not on the ground that such beliefs are inherently irreligious.

449 Other applications

The courts are no longer in agreement on the validity of blasphemy statutes or ordinances, challenged as in violation of the constitutionally guaranteed freedoms of religion, of speech, or of the press. In the earlier cases they were generally upheld, but the most recent cases have broken the line of formerly uniform decisions upholding such statutes or ordinances. The Supreme Court has held that the First Amendment prohibits the state from banning the communication of ideas deemed by some to be blasphemous or sacrilegious. But a statute proscribing the use of "profane" telephone calls does not abridge the First Amendment right of freedom of religion. Persons may not be compelled, in violation of their religious beliefs, to salute the United States flag. However, it has been held that military regulations requiring a soldier to salute his superior officers and his flag were not intended to interfere with religious liberties, and enforcement of such regulations by a proper military tribunal did not violate the Constitution.

Other specific cases in which challenges based on claims of a violation of the First Amendment guarantee of religious freedom have been sustained in some instances, and rejected in others, are noted below.

450 Generally; constitutional protection

The First Amendment to the Constitution of the United States, and the bills of rights of most of the states, contain express prohibitions against the enactment of laws which would abridge the freedom of speech or of the press. It has been held, consistent with the general rule as to the first eight amendments to the Federal Constitution, that the First Amendment limiting federal abridgment of such rights is not itself applicable to state action. The modern -- and now firmly established -- view, however, is that the same fundamental principles which are contained in that amendment protect the rights there enumerated from any state abridgment by virtue of the Due Process Clause of the Fourteenth Amendment. Thus, the rule is that the rights of freedom of speech and of the press are among the fundamental rights and liberties protected by the Due Process Clause of the Fourteenth Amendment from impairment by state action, and that any government action which chills constitutionally protected speech or expression contravenes the First Amendment.

Observation: "Government" or "state" action includes a municipal ordinance adopted under state authority, and state action accomplished solely by judicial act, as, for example, where injunctive relief is sought against personal defamation.

Observation: The English common law is inapplicable in this country on questions concerning liberty of speech and press.

451 Purpose of constitutional guarantees of free speech and press

The constitutional guarantees of freedom of speech and of the press were intended generally to put an end to restraints and limitations which at one time in English history had been imposed on the right of the public to speak and to write. These guarantees have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. The constitutional right of free expression is intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. The safeguarding of the rights of free speech and press to the end that individuals may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government.

Because the effective functioning of a free government depends largely on the force of an informed public opinion and such informed understanding depends on the freedom people have to applaud or criticize the way public employees do their jobs, the purpose of the right of free speech guaranteed to every person by the First Amendment to the Federal Constitution is to give to each citizen the right to criticize public men and measures. Thus, a major purpose of the First Amendment is to protect the free discussion of governmental affairs, including discussions about public officials and candidates for public office, and to foreclose public authorities from assuming a guardianship of the public mind through regulating the press, speech, and religion.

The safeguarding of free speech and a free press is a national constitutional policy, and there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

452 Nature of constitutional guarantees of free speech and press

The Supreme Court has said that the nature and principal function of free speech under our system of government is to invite dispute, and that it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. The freedoms of speech and of press are fundamental personal rights and liberties, the exercise of which lies at the foundation of free government by free people. It is only through free debate and free exchange of ideas that the government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets the United States apart from totalitarian regimes. [n59] This right was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

The constitutional guarantees of freedom of speech and press are not for the benefit of the press so much as for the benefit of all the people; the broadly defined freedom of the press assures the maintenance of the American political system and an open society.

In its broadest sense, the phrase "freedom of the press" includes not only exemption from censorship, but security against laws enacted by the legislative department of the government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion. The freedoms of speech and press are such intimate elements of liberty that there is an instinctive and instant revolt from any limitation of them, either by law or a charge under the law. And such freedoms are constitutionally protected not only against heavy-handed frontal attack, but also from being stifled by a more subtle governmental interference. Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. And the First Amendment does not permit the government to restrict the speech of some elements of society in order to enhance the relative voice of others.

First Amendment rights are part of the heritage of all persons and groups, and are not to be dispensed with or withheld merely because the Supreme Court or the Congress thinks the person or group is worthy or unworthy. The constitutional guarantee protects the impassioned plea of the orator as much as the quiet publication of the tabulations of the statistician or economist, and does not draw a line between informing the people and inciting or persuading them. The size of the audience or its nature is wholly irrelevant to the issue of free speech. The First Amendment creates a preserve where the views and beliefs of the individual are made inviolate, and gives freedom of mind the same security as freedom of conscience.

453 Scope of constitutional guarantees of free speech and press; generally

If there is a bedrock principle underlying the scope of the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable. An absolutely free discus-

sion of the problems of society is a cardinal principle of Americanism, and the vitality of civil and political institutions in our society depends on such discussion. Freedom of speech and of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.

Observation: Although the state may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information, outside that context it may not compel an affirmance of belief with which the speaker disagrees; indeed, this general rule, that the speaker has a right to tailor his or her speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact that the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. The general rule that a speaker has the right to tailor his or her speech is not restricted just to the press; instead, it is a right enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers; its point is simply the point of all speech protection, which is to shield even those choices of content that in someone's eyes are misguided, or even hurtful.

The underlying safeguard of the constitutional provision for freedom of the pressor speech is "that opinion is free and conduct alone is amenable to the law." So long as the means are peaceful, the communication need not meet standards of acceptability in order to be protected by the constitutional guarantee of freedom of expression, since the government may not regulate speech based on its substantive content or the message it conveys, nor may it, in the realm of private speech or expression, favor one speaker over another, inasmuch as any discrimination against speech because of its message is presumed to be unconstitutional. Therefore, the First Amendment generally prevents the government from proscribing speech or even expressive conduct because of its disapproval of the ideas being expressed.

The First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive. Under the First Amendment the public has a right to every individual's views and every person has the right to speak them, without regard to whether the persons involved are famous or anonymous. The First Amendment's basic guarantee is that of freedom to advocate ideas, and freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech. Moreover, the rights of free speech and free press, although not identical, are inseparably connected with the rights to assemble peaceably and to petition for a redress of grievances, all of which rights are among the most precious of the liberties safeguarded by the Bill of Rights.

454 Freedom from prior restraints and censorship, generally

Freedom of speech and press, historically considered and taken up by the Federal Constitution, means principally, although not exclusively, immunity from previous restraints or censorship. The term "prior restraint" is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. Thus, the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance, and the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of criminal sanction for past communication. Each passing day of a prior restraint on speech may constitute a separate and cognizable infringement of the First Amendment.

It is not merely the sporadic abuse of power by the censor, but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. The special vice of a prior restraint on expression is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.

Observation: The Supreme Court has ruled that the mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional under the First Amendment.

An essential element of the liberty of the press is its freedom from all censorship over what shall be published, and exemption from control, in advance, as to what shall appear in print. It has been said that censorship is a form of infringement upon freedom of expression to be especially condemned. For First Amendment purposes, prohibiting the publication of a news story is the essence of censorship, and is allowed only under exceptional circumstances.

The Supreme Court has stated that the First Amendment directs the courts to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good, including state attempts to deprive consumers of accurate information about their chosen products. For a state to empower its courts to enjoin the

dissemination of future issues of a publication because its past issues had been found offensive is the essence of censorship, and hence unconstitutional.

Improper restraints on communication may vary in form and degree, but all have the effect of restricting the dissemination of ideas. The clearest abuse is an outright prohibition of a constitutionally protected form of speech, but regulation short of absolute prohibition is also invalid when expression is made dependent upon state approval by the obtaining of a permit or is conditioned upon obtaining the approval of the board of censors; nor does the restriction become permissible because it merely limits the manner of expression rather than the initial right to communicate. Given the constitutionally protected interest in unfettered speech, an identifiable, countervailing state interest, consistent with First Amendment values, is required in order to justify a state regulatory scheme that, by punishing certain speech, induces self-censorship by those who would otherwise exercise their constitutional freedom.

455 Per se unconstitutionality of prior restraints and censorship

Prior restraints on free speech are not unconstitutional per se. The immunity from prior restraint which is an element of the freedoms of speech and press is, as are the freedoms themselves, subject to some limitations, at least in exceptional cases. Thus, the government may directly regulate speech to address extraordinary problems where its regulations are appropriately tailored to resolve those problems without imposing unnecessarily great restrictions on speech; and reasonable time, place, or manner restrictions on speech are recognized exceptions to the general prohibition against prior restraints. But the barriers to prior restraint remain high, since any system of censorship or classification which places a prior restraint upon expression bears a heavy presumption of invalidity, and the government has a heavy burden to establish that a particular restriction amounting to a previous restraint presents such an exceptional case.

The United States Supreme Court has said that in the context of free speech and press the phrase "prior restraint" is not a self-wielding sword, nor can it serve as a talismanic test; the duty of closer analysis and critical judgment in applying the thought behind the phrase requires a pragmatic assessment of the operation of the statute affecting speech or press in the particular circumstances.

Prior restraints have been accorded the most exacting scrutiny by the Supreme Court. A system of prior restraint on expression avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. The Supreme Court condemns systems in which the exercise of the power of public officials to deny use of a forum in advance of actual expression is not bounded by precise and clear standards; this distaste for censorship, reflecting the natural distaste of a free people, is deep-written in American law.

Observation: A system of prior restraint must contain the following safeguards in order not to run afoul of the First Amendment: (1) the burden of instituting judicial proceedings, and proving that the material is unprotected, must rest on the censor; (2) any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo; and (3) a prompt final judicial determination must be assured.

A prior restraint on speech is clearly not the same thing as a temporary suspension of the right to free speech. The courts generally agree that, where absolutely necessary, in an emergency situation, fundamental rights such as the right of free speech may be temporarily limited or suspended.

456 Permissible prior restraints and censorship

Based on the particular circumstances or methods of regulation involved, various other governmental or judicial acts have been upheld as permissible prior restraints or censorship. For instance, preliminary injunctions restricting abortion protesters' activities outside abortion clinics have been held not to be unlawful prior restraints on free speech, in light of the alternative channels of communication left open to the protesters.

A state statute, challenged on First Amendment grounds, under which persons who are nonparticipants in the proceedings of a state commission investigating judicial fitness are subject to criminal sanctions for divulging truthful information regarding the confidential proceedings before the commission does not constitute a prior restraint or attempt by the state to censor the news media, but the criminal punishment of third persons, including newspapers, pursuant to such statute is not permitted by the First Amendment guarantees of freedom of speech and press. A city ordinance forbidding a newspaper to carry help-wanted advertisements in sex-designated columns is not a denial of freedom of the press. An injunction restraining a publisher under the Federal Antitrust Act from refusing to accept local advertising from customers using a competing radio station for the same purpose has been held not to violate the freedom of the press as a prior restraint upon what it may publish. In view of the state's broad authority to control intoxicating liquors under the Twenty-First Amendment, state liquor department regulations prohibiting certain nude and sexually explicit live entertain-

ment or films in bars and nightclubs does not, on their face, violate the Federal Constitution, notwithstanding that the regulations proscribed some acts which were not obscene and which were within the limits of the First Amendment protection of freedom of expression. A secrecy agreement and secrecy oath exacted by the government from an employee of the Central Intelligence Agency was not a prior restraint upon the former agent's freedom of speech; the agreement's provision for submission of material to the CIA for approval prior to publication was enforceable, provided that the CIA acted promptly upon such submissions and withheld approval of publication only of information which was classified and which had not been placed in the public domain by a prior disclosure.

457 Impermissible prior restraints and censorship

Based on the particular circumstances or methods of regulation involved, various governmental or judicial acts have been struck down as impermissible prior restraints or censorship. For example, a state statute making it a crime for a newspaper to publish, without the written approval of a juvenile court, lawfully obtained, truthful information identifying by name a youth charged as a juvenile offender, violates the First and Fourteenth Amendments, there being no justification for the imposition of criminal sanctions for publication of a juvenile's name that is lawfully obtained in any state interest in protecting the anonymity of juvenile offenders to further their rehabilitation. An order of a state employment relations commission prohibiting a school board from allowing employees, other than representatives of the union which had been certified as the majority collective-bargaining representative of teachers in the district, from appearing and speaking at meetings of the board on matters subject to collective-bargaining between the board and the union constitutes an improper prior restraint upon the First Amendment rights of teachers, since the order is designed to govern speech and conduct in the future, not to punish past conduct. The protection afforded by the First Amendment's guarantee of free press against prior restraint is of particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct; a state court's order enjoining the reporting, prior to publication, of information implicating the accused is too vague and too broad to survive the scrutiny given by the United States Supreme Court to restraints on First Amendment rights. A law imposing sanctions upon the publication of the name of a rape victim obtained from official court records open to the public is violative of the constitutional protection of free press. Denial of the use of a municipal theater for showing a controversial musical constitutes a prior restraint on free expression; and it is immaterial whether the promoter might have used some other theater since, even if a privately-owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. An injunction against the distribution of leaflets accusing a real-estate broker of "panic peddling" activities was unconstitutional as a prior restraint on First Amendment rights. A city ordinance making it an offense to parade without first obtaining a permit from the city commission, and authorizing the commission to refuse a permit if required by the "public welfare, peace, safety, health, decency, good order, morals, or convenience," was held to be an unconstitutional censorship or prior restraint upon the enjoyment of First Amendment freedoms. Where an ordinance made a bookseller's possession of obscene writings a criminal offense, without requiring knowledge by the bookseller of the contents of the book for the possession of which he was convicted, the Supreme Court struck down the ordinance, explaining that the strict liability feature dispensing with the requirement of scienter would tend to cause the bookseller to practice a form of self-censorship which would tend seriously to restrict the dissemination of books which were not obscene and which the state could not constitutionally suppress directly.

458 Regulations based on speaker's viewpoint or content of speech; "hate speech" laws

A constitutionally permissible time, place, or manner restriction on speech may not be based on either the content or the subject matter of the speech, because the vagueness of a content-based regulation of speech raises special First Amendment concerns in view of its obvious chilling effect on free speech. "Viewpoint discrimination" is an egregious form of content discrimination, and therefore the government must abstain from regulating speech when a specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction. The First Amendment, subject only to certain narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private parties, and content-based regulations of speech are presumptively invalid under the First Amendment. Furthermore, the government's power to impose content-based financial disincentives on speech does not vary with the identity of the speaker.

Thus, an ordinance making it disorderly conduct for a person to place on public or private property a symbol, object, appellation, characterization, or graffiti, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender is facially unconstitutional under First Amendment. A municipality's desire to communicate to minority groups that it does not condone "group hatred" represented in bias-motivated speech does not justify such an ordinance, nor can it be justified on the ground that the ordinance was narrowly tailored to serve a compelling state interest in ensuring basic human rights of groups which have been historically discriminated against.

The provisions of a federal statute prohibiting the transmission of obscene or indecent communications over the Internet to persons under the age of 18, or sending patently offensive communications through the use of an interactive computer service to persons under that age, have been held unconstitutional as content-based prior restraints on speech. And while a forum created by a university's funding of printing for student publications is a forum more in a metaphysical than spatial or geographic sense, the same principles with respect to limitations on speech are applicable. Thus, where the university did not exclude religion as a subject matter for student publications for which it would provide funding for printing, but denied funding to student journalistic efforts which had religious editorial viewpoints, the First Amendment challenge to the denial of funding would be analyzed from the standpoint of viewpoint discrimination. Exclusion by the government of several views on a problem under debate is just as offensive to the First Amendment as the exclusion of only one, and it is as objectionable to exclude both theistic and atheistic perspectives on the debate as it is to exclude one, the other, or some other political, economic, or social viewpoint.

In administering a public forum, the government may not permit speech that expresses one viewpoint while prohibiting speech that expresses the opposite viewpoint; the government has no authority to license one side of a debate to fight freestyle while forbidding the other to fight at all.

The First Amendment's hostility to content-based regulation extends not only to restrictions on a particular viewpoint, but also to a prohibition of public discussion of an entire topic, inasmuch as allowing a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Observation: The First Amendment does not forbid viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose. However, the existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discrimination.

459 Content-neutral regulations

For First Amendment purposes, content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do; thus, they are subject to a less rigorous analysis, which affords the government latitude in designing regulatory solutions. The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech. A city may require periodic licensing of news racks on public property and may even have special licensing procedures for conduct commonly associated with such expression, but the city is required to establish neutral criteria to ensure that its licensing decision is not based on the content or viewpoint of the speech being considered. An ordinance giving a mayor unbridled authority to approve or deny an application for a license to place news racks on public property is unconstitutional because the ordinance requires the newspapers to apply annually for news rack licenses and because the licensing system is directed at expression or conduct commonly associated with expression. But a content-neutral Postal Service regulation prohibiting solicitations on postal premises, as applied to members of a political advocacy group who were soliciting contributions, selling books and newspaper subscriptions, and distributing political literature on the sidewalk near the Post Office entrance, does not violate the free speech protections of the First Amendment. And a municipal ordinance making it unlawful for any person to picket before or about a residence or dwelling of any individual is content neutral for First Amendment purposes.

The government's interest in protecting children from exposure to patently offensive sex-related material is a compelling one. Thus, a federal statute allowing cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels has been held consistent with the First Amendment.

The necessity of confining a limited public forum to the limited and legitimate purpose for which it was created may justify a state in reserving it for certain groups or discussion of certain topics but, once it has opened a limited forum, the state must respect lawful boundaries it has itself set and may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of viewpoint. In determining whether a state is acting to preserve the limits of a forum it has created so that the exclusion of a particular class of speech is legitimate, there is a distinction between content discrimination, which may be permissible if it preserves the purpose of the limited forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

460 Tests to be applied to content-based and content-neutral regulations

The most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message, but regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue. When a law challenged under the First Amendment burdens core political speech, the courts will apply "exacting scrutiny," and uphold the restriction only if it is narrowly tailored to serve an overriding state interest. Regulations of speech that are regarded as content-neutral receive an intermediate rather than a strict scrutiny under the First Amendment; this includes regulations that restrict the time, place, and manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression. Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral. Regulations which permit the government to discriminate on the basis of the content of a speaker's message ordinarily cannot be tolerated under the First Amendment.

Practice guide: To determine whether a regulation is content-based, in which case a court would apply the strict scrutiny test, or content-neutral, in which case a court would apply the intermediate scrutiny test, a court asks whether the government has adopted the regulation of speech because of its disagreement with the message it conveys or whether the regulation serves purposes unrelated to the content of the expression. And even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion.

Despite the foregoing, the Supreme Court has held that the fact that an injunction limiting the protests of antiabortion demonstrators restricted only their speech and not others did not make the injunction content-based, such that it should be viewed under the strictest standard of scrutiny, since the state court imposed restrictions on the protesters incidental to their antiabortion message because they repeatedly violated the court's original order, and the fact that the injunction covered people who shared a particular viewpoint did not in itself render the injunction content or viewpoint based.
461 Guarantees as protecting publication, distribution, and receipt of material
The constitutional guarantee of freedom of speech and press embraces the distribution or circulation of speech. It also protects the publication of, and necessarily protects the right to receive and read, or to see and hear, the matter being distributed or broadcast.

Observation: The regulation by the government of the radio and television broadcast industry presents a particular concern with regard to the means of distribution of protected speech. Obviously, a locality may theoretically support the publication of any number of newspapers, books, or other printed matter. However, there are a limited number of channels available to broadcast media, and some government control of access to the "airwaves" must be agreed upon, since seven television stations may not broadcast on the same channel in the same locality. Thus, where some degree of governmental control must be tolerated for the broadcast of speech to be effective, the Supreme Court has developed an intermediate scrutiny standard, under which, for First Amendment free speech purposes, the government may employ a means of its own choosing, so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and does not burden substantially more speech than is necessary to further that interest.

Liberty in circulating one's speech is as essential to the freedom as is liberty of publishing, since publication without circulation would be of little value. The Supreme Court has pointed out that freedom of speech is indispensable to the discovery and spread of political truth and that the best test of truth is the power of the thought to get itself accepted in the competition of the market; also, the Court has said, freedom of speech protects the individual's interest in self-expression. Thus, the freedoms of speech and press assured by state and federal constitutions are as much infringed by an improper interference with distribution as by an improper interference with publication. The privilege of distributing may not be withdrawn, even if it creates the minor nuisance for a community of cleaning litter from its streets.

The courts have ever been alert to strike down any infringement or limitation upon the fundamental right freely to publish and distribute news and comments. Proof of an abuse of power in a particular case is not requisite to a successful attack on the constitutionality of a statute purporting to license or restrict the dissemination of ideas. The highest form of state interest must be involved in order to sustain the validity, under the First Amendment, of a statute imposing a penal sanction for the publication of lawfully obtained, truthful information; when a state attempts to punish publication after the event, it must demonstrate that its punitive action is necessary for the state interest asserted. Where a rape vic-

tim brought suit against a newspaper for publishing her name which it had obtained from a publicly released police report, the state courts awarded the rape victim compensatory and punitive damages, and the newspaper appealed, the Supreme Court held that imposing damages on the newspaper violated the First Amendment since the information was obtained lawfully, identification of the victim was accurate, and imposing liability did not serve to further a state interest of the highest order.

Although distribution of information is constitutionally protected, still, the peace, good order, and comfort of the community may imperatively require some regulation of the time, place, and manner thereof, and enforcement of general laws against the press is not, under the First Amendment, subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

462 Protection as extending to silence; right not to speak

The right not to speak inheres in political and commercial speech alike, and extends to statements of fact as well as statements of opinion. Thus, the Supreme Court has ruled that the difference between compelled speech and compelled silence is without constitutional significance in the context of protected speech, as the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.

On the question whether the constitutional guarantee of free speech encompasses a freedom to remain silent, it has been said that there is justification for the view that the two freedoms are separate, and that freedom to remain silent is a freedom of privacy, different in characteristics and governed by different considerations from the constitutionally protected freedom of speech. It has been pointed out that the public policy which supports freedom of speech is that the safety of democratic government lies in open discussion, while the public interest in privacy is premised upon the individual's right to the pursuit of happiness. Still, the Supreme Court has pointed out that the Constitution cannot force anyone to exercise the freedom of expression which it guarantees, and there are numerous cases supporting the view that the First Amendment protects the right of persons to refrain from speaking. The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of the mind.

Observation: One important manifestation of the principle of free speech is that one who chooses to speak may also decide what to say and what not to say.

463 Protection as prohibiting compelled or coerced speech

The First Amendment protects persons from being compelled to express adherence to an ideological point of view they find unacceptable.

A variety of circumstances have given rise to the issue whether the First Amendment right to freedom of speech and press includes the right to refuse to express views repugnant to one's moral, religious, or political beliefs. The First Amendment right to freedom of speech protects an individual's right not to participate in a flag salute or a pledge of allegiance to the United States flag. Newspaper editors or publishers have been held to have a First Amendment right, under the guarantee of freedom of the press, to refuse to abide by a state statute providing political candidates with a right to reply to the newspaper's criticism. Where the state's interest is to disseminate an ideology, no matter how acceptable it is to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message. The right to refrain from fostering or otherwise expressing certain views has also been recognized in the area of employment. The Supreme Court has indicated that in accord with the First Amendment right to freedom of speech, public employees may prevent a union from spending part of their compulsory service fees to express political views which the employees oppose and which are unrelated to the union's duties as exclusive bargaining representative.

The Supreme Court has held that provisions of a state abortion statute, requiring a physician, before performing an abortion, to provide information to his or her patient about the nature of the abortion procedure, the health risks of abortion and of childbirth, and the probable gestational age of the unborn child, do not violate a physician's First Amendment rights not to speak, since the statute implicates such rights only as part of the practice of medicine, which is subject to reasonable licensing and regulation by the state.

Observation: Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning do not violate the First Amendment as conditioning receipt of a benefit (Title X funding) on relinquishment of the First Amendment right to engage in abortion advocacy and counseling. Such regula-

tions do not force any Title X grantee, or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from activities of the Title X project.

As one of many examples that could be given in the commercial speech area, one court has held that a strong consumer interest in whether dairy products come from cows treated with bovine growth hormone does not constitute a substantial state interest, as would be necessary to justify under the First Amendment a statute requiring dairy manufacturers to label products from hormone-treated cows. The court said that manufacturers cannot be compelled to disclose that information, absent some indication that it bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern.

464 Freedom of legislative debate; parliamentary freedom

Legislators are generally immune from any type of action against them, civil or criminal, for acts done or statements made in their official capacity. In the case of United States Senators and Representatives, this immunity is protected by a constitutional provision that states that, for any speech or debate in either House of Congress, they shall not be questioned in any other place. There are similar provisions in most state constitutions, but the privilege was well established in the common law even before these constitutions were adopted. The privilege is given, not for the benefit of the legislators, but to support the rights of the people by enabling their representatives to function freely without fear of harassment. It is therefore to be liberally construed, and, for the same reason, a claim of unworthy motive does not destroy the privilege.

465 Broad or liberal construction, generally

The First Amendment does not speak equivocally, but prohibits any law abridging the freedom of speech or of the press, and is to be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. A broad conception of the First Amendment's guarantee of freedom of speech and press is necessary to supply the public need for information and education with respect to the significant issues of the times. On the other hand, the Supreme Court has said that the free speech provisions of the First Amendment must be construed as part of a Constitution which creates a government for the purpose of performing several very important tasks, and that the First Amendment should be interpreted so as not to cripple the regular work of the government.

466 Who is protected, generally; citizens and aliens

The freedoms of speech and press are available to all, and extend to every citizen or class or group of citizens, and not merely to those who "can pay their own way."

Freedom of speech and press is also accorded aliens residing in this country; and its scope is not narrower because the right is exercised by a naturalized citizen, even though he or she expresses views which may collide with cherished American ideals.

467 Corporations and other associations of people

Associations of individuals, such as labor unions, political action committees, and corporations are entitled to enjoy the constitutional rights of free speech and press as well as individuals, since the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.

Observation: The speech of heavily regulated businesses, such as public utility companies, enjoys constitutional protection; the utility's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters.

468 Mass media, artists, and entertainers

The expression of editorial opinion on matters of public importance is a kind of communication entitled to the most exacting degree of First Amendment protection. Since radio and television broadcasters are engaged in a vital and independent form of communicative activity such that the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area, they are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties.

Similarly, artists and musicians, and even inspirational T-shirt sellers, are entitled to freedom of speech and press.

469 Minors, students, and teachers

Minors are entitled to a significant measure of First Amendment protection. However, the First Amendment rights of minors are not coextensive with those of adults, and a state may permissibly determine that at least in some precisely delineated areas, a child is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. In assessing whether a minor has the requisite capacity for individual choice, the age of the minor is a significant factor.

470 Politicians and candidates for public offices

The manifest function of the First Amendment in a representative government requires that legislators be given the widest possible latitude to express their views on issues of policy, and a state may not apply to its legislators stricter standards than it applies to its citizens as to the protection afforded by the free speech guarantee of the First Amendment. And a candidate for public office, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his or her own election and the election of other candidates. Similarly, the solicitation and use of funds to support a political candidate is protected speech.

471 Professional fund raisers; charitable solicitations

The solicitation of funds and the dissemination of knowledge for and with reference to a worthy charitable organization are within the protection of the guarantees of freedom of speech and freedom of the press as enunciated in the constitution of a state and the Constitution of the United States. Professional fundraisers are therefore protected by the First Amendment. Thus, the fact that a fundraiser is paid to disseminate information on behalf of charities by which it was hired does not, in itself, render its activity outside the protection of the First Amendment.

Observation: The solicitation of charitable contributions is protected speech, and the state's interest in protecting charities and the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation of speech. However, because solicitations for charitable contributions are so intertwined with speech that they are entitled to protection under the First Amendment, statutes attempting to restrict such speech must be narrowly tailored to achieve an important governmental interest without unnecessary infringement of First Amendment freedoms.

472 Public employees and political patronage

By accepting public employment one does not forgo his or her right to freedom of speech. Although the state's interest in regulating the speech of its employees as a class differs significantly from its interest in regulating such activities by the general public, even so a public employee is entitled to First Amendment protections which include the right, within limits, to criticize and to comment upon matters touching the public service in which the employee is engaged. The wholesale practice of dismissing public employees based on their political affiliation, historically characterized by the saying "to the victor goes the spoils," is prohibited under the First and Fourteenth Amendments. Thus, a public employee has a First Amendment right not to be fired for political patronage reasons if political affiliation is not an appropriate requirement for effective performance of the job. However, political party affiliation is an appropriate requirement for certain positions in government, such as a county's purchasing agent, chief financial officer, and office manager, a staff legal assistant, or an assistant county attorney, and therefore such persons are not entitled to First Amendment protection from politically motivated dismissals.

Observation: It is generally accepted by the courts that a good rule to follow for the purpose of determining whether an employee may or may not be fired for political patronage reasons is that the farther removed from the executive, policy-making level an employee is, the less relevant his or her political loyalty becomes.

473 Who is bound

As a general rule, the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state, and not by private persons using their property nondiscriminatorily for private purposes only. Thus, the First Amendment, the terms of which apply only to governmental action, ordinarily does not itself throw into constitutional doubt decisions of private citizens to permit, or to restrict, speech, even where those decisions take place within the framework of a regulatory regime such as broadcasting.

474 Anonymous publications

In the absence of some countervailing reason that will pass the highest possible strict scrutiny test, anonymous publications are entitled to protection under the First Amendment, particularly in view of the fact that anonymous pamphleteering played such an important role in the creation of the United States itself. The Supreme Court has said that, under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent, and that anonymity is a shield from the tyranny of the majority. Anonymity has sometimes been assumed for the most constructive purposes; and anonymous pamphlets, leaflets, and books have played an important role in the progress of humankind. Furthermore, the fear of identification and reprisal might deter a perfectly peaceful discussion of public matters of importance.

Freedom under the First Amendment to publish anonymously extends beyond the literary realm to the advocacy of political causes. Core political speech protected by the First Amendment need not center on a candidate for office, but also extends to issue-based elections. Thus, a state statute making it a misdemeanor to publish anonymous political campaign literature designed to injure or defeat any candidate for nomination or office is invalid in that it unconstitutionally infringes upon the right of free speech. And proposed legislation making it a crime for any daily or weekly newspaper in

the state to publish an editorial without disclosing the name of the person who wrote the editorial constitutes an abridgment of freedom of speech or freedom of press in violation of the First Amendment to United States Constitution made applicable to the states by the Fourteenth Amendment.

The anonymity of an author is not ordinarily a sufficient reason to exclude his or her work product from the protections of the First Amendment. The author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of freedom of speech protected by the First Amendment. An interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Since freedom under the First Amendment to publish anonymously extends beyond the literary realm to the advocacy of political causes, a state's statutory prohibition against the distribution of anonymous campaign literature could not be justified under the First Amendment as a means of preventing the dissemination of untruths, where the statute contained no language limiting its application to fraudulent, false, or libelous statements.

Observation: The First Amendment does not prohibit a "confidential source" from recovering damages under promissory estoppel law for a newspaper publishers' breach of the promise of confidentiality in exchange for the information. The doctrine of promissory estoppel is a law of general applicability, and any inhibition of truthful reporting is no more than an incidental consequence of applying the generally applicable law.

475 Conflict with right of privacy

The rights guaranteed by the First Amendment do not require total abrogation of the right to privacy, inasmuch as the Supreme Court has ruled that there is no constitutional right to force speech into the home of an unwilling listener. For example, a state bar's interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers has been deemed a substantial interest, for purposes of a *Central Hudson* intermediate scrutiny of state bar rules which prohibited lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster or accepting referrals obtained in violation of that prohibition.

Despite the constitutional guarantee of freedom of expression, the government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue. Nothing in the United States Constitution compels persons to listen to or view any unwanted communication, whatever its merit, and no one has a right to press even "good" ideas on an unwilling recipient. Thus, a statute that authorizes a householder to require that his or her name be removed from the mailing list of a mailer of pandering advertisements and that all future mailings to the householder should cease does not violate the First Amendment. A mailer's right to communicate must stop at the mailbox of an unreceptive addressee. On the other hand, the ability of government to shut off discourse solely to protect others from hearing it is dependent on a showing that substantial privacy interests are being invaded in an essentially intolerable manner. While a state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content, nevertheless when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its powers. Selective restrictions are valid only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.

The mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. The determination of issues pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors demands delicate balancing because, in the sphere of collision between claims of privacy and those of free speech, the interests on both sides are plainly rooted in the traditions and significant concerns of the American society.

476 Interference with newsgathering function; generally

The First Amendment provides at least some protection for news agencies' efforts to gather news, and it protects their right to receive protected speech. However, even the great general interest in an unfettered press may at times be outweighed by other great societal interests, and therefore the press is not immune from restrictions or regulations. The right of the press to speak and publish does not carry with it the unrestrained right to gather information.

477 Access to information

The First Amendment right to gather news is not absolute. For example, the First Amendment does not guarantee to the press a constitutional right of special access to information or places not available to the general public. The First Amendment does not:

.permit the press to break and enter an office or dwelling to gather news with impunity;

.relieve a newspaper reporter of an obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation even though the reporter might be required to reveal a confidential source;

.permit the press to publish copyrighted materials without obeying the copyright laws;

.relieve the media of its obligation to obey the National Labor Relations Act and the Fair Labor Standards Act;

.permit a restraint of trade in violation of the antitrust laws; or

.relieve the media of an obligation to pay nondiscriminatory taxes.

And enforcement of general laws against the press is not, under the First Amendment, subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

478 Criminal laws and proceedings

The First Amendment does not, in the interest of securing news or otherwise, confer a license on either the reporter or his or her news sources to violate otherwise valid criminal laws. And neither a state reporter's "shield law" nor the First Amendment will protect a reporter against a subpoena requiring the reporter and the newspaper company to produce certain documents to be used for the purpose of cross-examining prosecution witnesses in a state murder trial, where the trial judge has certified that the documents were necessary and material for the defendant and has stated that when the documents were produced, he would afford the newspaper company and the reporter a full hearing on their claims that the subpoena was illegal. In other words, the right of "getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity," is a far cry from the type of freedom of expression, comment, and criticism so fully protected by the First and Fourteenth Amendments of the Constitution.

Practice guide: By virtue of the First Amendment, the press receives a qualified right of access to most criminal proceedings. To determine whether a particular proceeding should be made public pursuant to the First Amendment, the court should first evaluate whether the qualified right of access attaches to the proceeding, which involves consideration of two complementary concerns -- whether the place and proceeding in question has historically been open to the press and public, and whether the public access plays a significant positive role in the functioning of the particular process in question; if the qualified right attaches, the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Generally, however, the public and the press have a qualified constitutional right to attend criminal trials as well as post-trial proceedings.

Members of the press have no constitutional right, independent of an accused's public-trial right under the Sixth and Fourteenth Amendments, to insist upon access to a pretrial judicial proceeding in a criminal case, and hence cannot require the opening of such a proceeding to them where the accused, the prosecutor, and the trial judge have all agreed to the closure of the proceeding in order to ensure a fair trial.

When a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to a plaintiff's reputation, the plaintiff is not barred because of any absolute privilege for the editorial processes of a media defendant -- under the First Amendment's guarantees of freedom of speech and freedom of the press -- from inquiring into the editorial processes of those responsible for the alleged defamatory material, where such inquiry will produce evidence material to the proof of a critical element of the plaintiff's case.

The premises of a newspaper may be searched pursuant to a properly issued warrant.

479 Regulation of press as business

The press does not possess any immunities not shared by every individual, and newspapers are not generally affected with a public interest so as to stand on a different ground with respect to statutory regulation than do ordinary persons. Thus, the publisher of a newspaper has no special privilege to invade the rights and liberties of others; he or she must answer for libel, and may be punished for contempt of court. Moreover, the press, to the extent that it is a business activity, is not immunized from all regulation to which other business activities are subject, and the publication of newspapers is subject to the same obligations placed upon other businesses.

While the First Amendment protects the press from the imposition of special liabilities upon it, nevertheless the constitutional guarantee does not exempt a publisher, because of the nature of his or her calling, from an imposition generally exacted from other members of the community.

The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability; otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. Thus, like others, newspaper publishers must pay equitable and nondiscriminatory taxes on their business, and they are subject to the antitrust laws, as well as to federal labor laws.

480 "Commercial speech"; generally

The First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. However, commercial speech enjoys a more limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.

Commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent; once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then such speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. In order to determine whether a government restriction on commercial speech is permissible, a court examines four factors: (1) whether the expression concerns a lawful activity and is not misleading; (2) whether the government's interest is substantial; (3) whether the restriction directly serves the asserted interest; and (4) whether the restriction is no more extensive than necessary.

Practice guide: The overbreadth doctrine does not apply to commercial speech.

A law restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny, since commercial speech is linked inextricably with the commercial arrangement that it proposes, so that the state's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. The Supreme Court allows room for legislative judgments within the bounds of the general protection provided by the Constitution to commercial speech. However, even assuming that a flat ban on commercial solicitation can be regarded as a content-neutral time, place, or manner restriction on speech, a challenged restriction of that type still must serve a substantial state interest in a direct and effective way under the First Amendment. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the First Amendment's guarantee with regard to noncommercial speech. Thus, the First Amendment's safeguards are neither wholly applicable nor wholly inapplicable to business or economic activity.

Observation: Under the First Amendment, commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental on the general populace. Nor is the mere possibility that some members of the population may find particular advertising embarrassing or offensive sufficient justification for suppressing it.

481 Requirement that advertising be legal, truthful, and not misleading

Only truthful advertising related to lawful activities is entitled to the protection of the First Amendment. In order for commercial speech to be entitled to any First Amendment protection, the speech must first concern a lawful activity and not be misleading. A state may ban altogether commercial expression that is fraudulent, misleading, or deceptive, without further justification, but where truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, the state must demonstrate that the restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end. Furthermore, under the commercial speech doctrine, states may not even place an absolute prohibition on certain types of potentially misleading information if the information may be presented in way that is not deceptive.

Even when a communication is not misleading, the state retains some authority to regulate it; but the state must assert a substantial interest and any interference with speech must be in proportion to the interest served.

Because the disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information, only false, deceptive or misleading commercial speech may be banned. Cer-

tainly, the First Amendment does not protect all proposals to engage in commercial transactions, and protection is not accorded at all when the underlying transaction is illegal.

Observation: The rule most recently established by the Supreme Court is that when a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires disclosure of beneficial consumer information, the purpose of the regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than a strict review, but when a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands. Commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose, and the state bears the burden of showing not merely that the regulation will advance the state's interest, but also that it will do so to a material degree.

482 "Reasonable fit" requirement

The least restrictive means test, as applied to noncommercial speech, has no role in any First Amendment analysis in the commercial speech context. In the commercial speech context, there must be a "fit" between the legislature's ends in regulating speech and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable, one that represents not necessarily the single best disposition, but one whose scope is in proportion to the interest served, and one that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective.

The government's burden in justifying a restriction on commercial speech is not satisfied by mere speculation or conjecture; instead, the government must demonstrate that the harms it recites are real and substantial. In determining the constitutionality of the regulation of commercial speech that concerns a lawful activity and is not misleading, a court must consider whether the asserted governmental interest supporting the regulation is substantial and, if so, the court must determine whether the regulation directly advances the governmental interest asserted and whether it is no more extensive than necessary to serve that interest.

483 "Intermediate scrutiny" test

The Supreme Court now engages in an "intermediate scrutiny" of restrictions placed on commercial speech, analyzing them under the framework established in the *Central Hudson case*. Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or that is misleading; but commercial speech that neither concerns unlawful activity nor is misleading may be regulated only if the government asserts a substantial interest in support of its regulation, demonstrates that the restriction on commercial speech directly and materially advances that interest, and ensures that the regulation is narrowly drawn. Unlike the rational basis review, the *Central Hudson* intermediate scrutiny of restrictions on commercial speech does not permit a court to supplant the precise interest put forward by the state with other suppositions. A single substantial interest is sufficient to satisfy the first prong of the *Central Hudson* standard for government regulation of commercial speech.

Practice guide: The burden under the *Central Hudson* intermediate scrutiny test of restrictions on commercial speech of demonstrating that a challenged regulation advances the government's interest in a direct and material way is not satisfied by mere speculation and conjecture; rather, the governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.

484 Particular kinds of advertising; advertising on billboards

Commercial illustrations and advertisements on billboards are entitled to the same First Amendment protections afforded verbal commercial speech, and restrictions on the use of visual media of expression in advertising must survive intermediate scrutiny under the test of *Central Hudson*.

Observation: A city ordinance prohibiting billboards altogether, defined as offsite advertising signs, to promote the twin goals of aesthetics and traffic safety, does not impermissibly restrict commercial speech.

While a city may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or to distinguish between, various communicative interests, and, as to noncommercial speech, a city may not choose appropriate subjects for public discourse. Thus, a billboard ordinance, insofar as it contained exceptions that permitted various kinds of noncommercial signs to remain, but which banned commercial billboards and required their removal, infringed upon the constitutional right of free speech. Absent any explanation why noncommercial billboards located in places where commer-

cial billboards were permitted would be more threatening to safe driving or would detract more from the beauty of the city, the city could not by ordinance choose to limit the content of billboards to commercial messages.

485 Advertising sent by mail

Under the First Amendment, "the level of commercial discourse reaching the mailbox cannot be limited to that which would be suitable for children playing in a sandbox." Thus, a statute prohibiting the unsolicited mailing of contraceptive advertisements cannot be justified under the First Amendment on the ground that it aided parents' efforts to discuss birth control with their children, where the marginal degree of protection achieved by purging all mailboxes of unsolicited material that was entirely suitable for adults was more extensive than the Constitution permitted.

486 Advertising in books, magazines, and newspapers

The free publication and dissemination of books and other forms of the printed word are protected by the constitutional guarantee of freedom of speech and press, irrespective of whether the dissemination takes place under commercial or noncommercial auspices. The First Amendment protects speech even though it is in the form of a paid advertisement in a book, magazine, or newspaper, in a form that is sold for profit, or in the form of a solicitation to pay or contribute money; such speech is not withdrawn from protection merely because it proposes a mundane commercial transaction, or because the speaker's interest is largely economic.

487 Advertising of gambling and lottery activities

A federal statute prohibiting the radio broadcast of lottery advertising by licensees located in nonlottery states directly advances the governmental interest of balancing the interests of lottery and nonlottery states for the purpose of determining whether the statute violates the First Amendment, even when a radio station located in a nonlottery state has signals that reach into a lottery state. Congress clearly is entitled to determine that broadcast of promotional advertising of lotteries would undermine a nonlottery state's policy against gambling, even if the audience in the nonlottery state was not wholly unaware of the lottery's existence. However, a federal statute prohibiting the broadcasting of advertising or information concerning any "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance" has been held violative of the First Amendment on the grounds that it did not, under the *Central Hudson* analysis, directly advance the government's purported interests in reducing public participation in commercial lotteries and in protecting states which choose not to permit casino gambling within their borders, where the statutory ban was subject to numerous exceptions for state-run lotteries, fishing contests, not-for-profit lotteries, lotteries conducted as promotional activities by commercial organizations, and lawful gaming conducted by Indian tribes.

488 Advertising of professional services

Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent deception. Thus, a ban on advertising by attorneys, accountants, or physicians violates First Amendment rights. Furthermore, a state may not, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems, since such advertising is constitutionally protected commercial speech which the state can regulate through less restrictive and more precise means, such as requiring lawyers to file any solicitation letters with a state agency.

Observation: Although an attorney's listing that he or she is a member of the bar of the Supreme Court of the United States is at least in bad taste and such a statement could be misleading to the general public unfamiliar with the requirements of admission to the bar of the Supreme Court, an absolute prohibition of listing that information violates the First Amendment without some finding that the statement could be misleading.

Commercial advertising by pharmacists of prescription drug prices has been held entitled to the protection of the First Amendment, notwithstanding its "commercial speech" character.

489 Advertising of alcohol and tobacco products

Some limitations on the advertising of alcohol and tobacco products may be justified. For instance, it is reasonable for a city to conclude that regulation of the outdoor advertising of alcoholic beverages directly and materially advances the city's interest in promoting the welfare and temperance of minors. Therefore, a city ordinance prohibiting the placement of stationary outdoor advertising that advertises alcoholic beverages in certain areas where children are likely to walk to school or play, in an effort to promote the welfare and temperance of minors, does not violate the commercial speech protections of the First Amendment. But a state's complete statutory ban on price advertising for alcoholic beverages abridges speech in violation of the First Amendment. And a federal statute prohibiting the display of alcohol content on beer labels violates the First Amendment's protection of commercial speech, even though the government has a substantial interest in protecting the health, safety, and welfare of citizens by preventing brewers from competing on the basis of alcohol strength, and even though the government has an interest in facilitating state efforts to regulate alcohol under the Twenty-First Amendment.

A city's objective in reducing cigarette consumption by minors is a "substantial public interest," for the purposes of determining whether a city ordinance that limits the location of signs that advertised cigarettes amounts to an impermissible regulation of commercial speech.

490 Advertising involving abortion services and contraceptives

A state is not free of constitutional restraints under the First Amendment, in regard to the prosecution of a newspaper editor for violating a statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, where the editor published an advertisement of an out-of-state organization which offered services relating to obtaining legal abortions in the state where the organization was located, merely because the advertisement involved sales or solicitations, because the editor was paid for printing it, or because the editor's motive or the motive of the advertiser may have involved financial gain. The existence of commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. Likewise, a state statute which prohibits any advertisement or display of contraceptives is an unconstitutional suppression of expression protected by the First Amendment, and such total suppression of commercial speech cannot be justified on the ground that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them and would legitimize sexual activity of young people.

491 General limitations on right of free speech and press

The right or privilege of free speech and press, guaranteed by the constitutions of the United States and of the several states, has its limitations; the right is not absolute at all times and under all circumstances, although limitations are recognized only in exceptional cases. Freedom of speech does not comprehend the right to speak whenever, however, and wherever one pleases, and the manner, place, or time of public discussion can be constitutionally controlled.

An oath of secrecy taken by grand jurors or witnesses before a grand jury does not deprive them of their constitutional right of free speech, which right is not absolute. But a state statute prohibiting a witness from ever disclosing his or her testimony given before a grand jury violates the First Amendment insofar as it prohibits the witness from disclosing his or her own testimony after the grand jury's term has ended; the state's interest in preserving grand jury secrecy is either not served by, or insufficient to warrant, a proscription of truthful speech on matters of public concern.

The First Amendment does not confer an absolute right to speak or publish, without responsibility, whatever one may choose.

Observation: The extraordinary protections afforded by the First Amendment's guarantee of free speech and press carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly, a duty widely acknowledged but not always observed by the press. It does no violence to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise such freedoms; the states have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior.

To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished, is finely drawn. Separation of legitimate from illegitimate speech calls for sensitive tools. The Constitution of the United States places on the Supreme Court the duty to say where the individual's freedom ends and the state's power begins. Whenever the constitutional freedoms of speech and association are asserted against the exercise of valid governmental powers, a reconciliation must be effected, requiring an appropriate weighing and balancing of the respective interests involved.

492 Limitation by legislation, generally

It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language; the right of free speech and press does not prevent the punishment of those who abuse this freedom. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. Thus, these freedoms are subject to limitation by a proper exercise of the police power of the states. Similarly, the constitutional freedom of speech and press does not extend its immunity to speech or writing used as an integral part of conduct in violation of a

valid criminal statute. Congress may distinguish between advocating change in the existing order by lawful elective processes and advocating change by force and violence; freedom for the one does not include freedom for the other, and denial of freedom to teach violence is not a denial of free speech. And to some extent Congress may regulate speech in time of war which would be a hindrance to the national war effort. However, any legislation affecting freedom of expression is closely scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society, for in the First Amendment area government may regulate only with narrow specificity to prevent a supposed evil. Thus, generally speaking, a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than is necessary to further those interests.

Observation: Where a law establishes a financial disincentive to create or publish works with a particular content, as where a criminal seeks to profit from his or her crimes, the state, in order to justify such differential treatment, must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech. Where First Amendment freedoms are at stake, precision of drafting and clarity of purpose of regulating legislation are essential. Where a prohibition is directed at speech and the speech is intimately related to the process of governing, the state may prevail only upon showing a subordinating interest which is compelling, and the burden is on the government to show the existence of such an interest. The constitutional guarantee of freedom of speech forbids the states to punish the use of words or language not within narrowly limited classes of speech, and even as to such a class, the power to regulate must be so exercised as not, in attaining a permissible end, to unduly infringe the protected freedom, since free expression cannot be abridged or denied in the guise of regulation. Governmental interference with constitutionally protected pure speech can be justified only as a regulation of the manner in which freedom of speech is exercised, and not as a prohibition of the substantive message conveyed.

With respect to freedom of speech and press, the First Amendment functions as a check on legislative power. The states do not have greater latitude than the United States Congress to abridge freedom of speech. And the doors barring federal and state intrusion into the area of freedom of speech and press cannot be left ajar; they must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

493 "Clear and present danger" doctrine; generally

The "clear and present danger" doctrine, first formulated by Justice Holmes, provides protection for utterances so that the printed or spoken word may not be the subject of previous restraint or subsequent punishment unless its expression creates a clear and present danger of bringing about a substantial evil which the government, federal or state, has the power to prohibit.

The question of when the right of free speech or press becomes wrong by excess is difficult to determine. Certainly, enjoining or preventing First Amendment activities before the demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation. The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs rather than to prevent it from occurring in order to obviate possible unlawful conduct. Legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from the present excesses of direct, active conduct are not presumptively bad because they interfere with and in some of their manifestations restrain the exercise of First Amendment rights. The issue in every case is whether the words used are used in such circumstances and are of such a nature as to create a "clear and present danger" that they will bring about serious substantive evils which rise far above public inconvenience, annoyance, or unrest. The Supreme Court has recognized that whether an utterance is likely to bring about a danger of substantive evils sufficient to justify impairment of the constitutional right of freedom of speech and press is a question of proximity and degree, that cannot be completely captured in a formula.

Any attempt to restrict First Amendment liberties must be justified by a clear public interest, threatened not doubtfully or remotely, but by a clear and present danger; the rational connection between the remedy provided and the evil to be curbed, which in another context might support legislation against the attack on due process grounds, will not suffice. The government may cut off a person's right to speak his or her views only when these views are no longer merely views, but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself. The likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press; the evil itself must be substantial and serious. It is imperative that when the effective exercise of the

rights of freedom of speech and press is claimed to be abridged, courts should weigh the circumstances and appraise the substantiality of the reasons advanced in support of the challenged regulations.

Observation: A determination made by a state court that a clear and present danger exists in a particular situation is not conclusive upon the Supreme Court and the issue is subject to its independent judgment.

The Supreme Court has said that, properly applied, the clear and present danger test requires a court to make its own inquiry into the imminence and the magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression; a court should also weigh the possibility that other measures will serve a state's interests. The freedoms of speech and press are dependent upon the power of constitutional government to survive, and if it is to survive, it must have the power to protect itself against unlawful conduct.

494 Application in general

The term "clear and present danger" may not be applied as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application. Where particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented. The power of a state to abridge the freedom of speech is the exception rather than the rule, and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government; the judgment of the legislature is not unfettered, and the limitation upon individual liberty must have appropriate relation to the safety of the state if it is to avoid violation of the Constitution.

The question as to the kind of danger which must be "clear and present" to justify interference with the right of free speech and press cannot be answered in the abstract. The danger may be described by the court in general terms, such as a clear and present danger to a substantial interest of the state, or to "interests which the state may lawfully protect," or to danger short of a threat as comprehensive and vague as a threat to the safety of the Republic or "the American way of life."

495 Application in specific factual situations

More often than not, the kind of danger contemplated by the clear and present danger rule depends upon the specific facts of a particular case. The rule has been applied -- with very mixed results -- in cases involving --

-- criminal prosecutions for opposition to war.

-- statutes penalizing the advocacy of the overthrow of the government by force or violence.

-- attacks on courts or judges, or contempt proceedings against lawyers.

-- picketing.

-- regulation of prison inmates' access to newspapers, periodicals, and so forth.

-- incitement to commit crimes.

-- breach of the peace or disorderly conduct.

-- miscellaneous situations.

The "clear and present danger" rule has been held not to be applicable to cases involving --

-- antitrust laws.

-- libel cases.

-- statutes regulating the conduct of labor union affairs.

-- statutes governing the use of school property for nonschool purposes.

-- demonstrations in an inappropriate place, such as before a courthouse.

496 Rule as to advocacy of unlawful acts

The First Amendment protects not only abstract discussion but also vigorous advocacy, certainly of lawful ends, against governmental intrusion.

Observation: Although agreements to engage in illegal conduct undoubtedly possess some element of association, the state may ban such agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it or on any underlying conduct constitutional immunities that the First Amendment extends to speech.

As regards state action, the advocacy rule has been stated by the Supreme Court to the effect that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Thus, advocacy of conduct proscribed by law is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy will be immediately acted on. Speech that merely stirs passions, resentment, or anger is fully protected by the First Amendment. On the other hand, it is well settled that the principle of freedom of speech does not sanction incitement to commit crimes.

In some specific situations, the advocacy of committing unlawful acts or of the forceful overthrow of the government has been held not protected by the free speech and press guarantee, without the court considering whether the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. It has been so held where the issue was an applicant's admission to the bar, or the advocacy of unlawful acts by an officer in the Armed Forces of the United States, or the deportation of an alien.

The "advocacy rule" has been applied in cases involving criminal prosecutions for opposition to a war or to the military generally, to cases involving advocacy of the overthrow of the government by force and violence, and to cases presenting miscellaneous situations.

497 Subject, scope and manner of speech; generally

The right to freedom of speech and press under the First and Fourteenth Amendments is as extensive with respect to discussion related to matters of local concern as to matters of federal concern; it protects speech and assembly regarding secular as well as political causes, and the rights of free speech and free press protected thereby are not confined to any particular field of human interest. These rights extend to myriad matters of public interest or concern, embracing all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period. The First Amendment assures the broadest colorable exercise of free speech and free press for religious, political, economic, scientific, news, or informational ends, inasmuch as the Constitution's basic guarantee of freedom to advocate ideas is not confined to the expression of ideas which are conventional or shared by a majority. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. It is a prized American privilege to speak one's mind on all public institutions, although not always with perfect good taste, and sometimes foolishly and without moderation. The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions. Hence the dissemination of various views may not be suppressed because they are unpopular, extreme, or controversial, annoying or distasteful, defiant or contemptuous, offensive to some hearers or viewers, or foolish and irresponsible. And this is so irrespective of the truth of the utterances. Since erroneous statement is inevitable in free debate, it must be protected if the freedoms of expression are to have the breathing space which they need to survive. The guarantee of the First Amendment protects expression which is eloquent no less than that which is unconvincing. In the realm of protected speech, a state legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

The constitutional protection is not limited to the exposition of ideas, and the protection afforded free speech extends to speech or publications which are entertaining as well as to those which are instructive or informative.

The freedom of the press extends to almost all reporting of recent events. It is not confined to comment on public affairs and those persons who have voluntarily sought the public spotlight, but covers, as well, the publication of a purely private individual's name or likeness. Particularly deserving of First Amendment protection are reports of "hot news," that is, items of possible immediate public concern or interest.

498 Unprotected utterances; generally

The protective cloak of the constitutional freedoms of speech and press is, as has been noted, limited in its scope; and the unconditional phrasing of the First Amendment is not intended to protect every utterance. Even the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic," nor would it

preclude expulsion of hecklers from assemblies, or permit religious worship to be disturbed by those anxious to preach a doctrine of atheism.

The constitutional guarantees do not permit unrestricted utterances or publication of remarks or literature which are obscene, threatening, untruthful, or fraudulent.

The First Amendment does not grant to the press protection from any law which in any fashion or to any degree limits or restricts the right to report truthful information. However, publications or utterances dealing with political matters, public officers, and candidates for office, are entitled to a measurable privilege by reason of the public interest involved therein, and the law does not tolerate any form of liability for comments on, or criticism of, the government; hence, such statements are constitutionally protected, provided that they are within the bounds of fair comment and are not motivated by actual malice. The constitutional rights and liberties of speech and press are also subject to the right of judicial tribunals to punish as for contempt where an utterance or publication tends to obstruct the courts in their administration of justice. And, under its police power, a state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare or safety.

499 Attorneys' speech

The speech of lawyers who represent clients in pending cases may, consistent with the Federal Constitution's First Amendment, be regulated under a less demanding standard than that established for regulation of the press, given that: (1) such lawyers are key participants in the criminal justice system, and therefore the state may properly demand some adherence to the precepts of that system in regulating such attorneys' speech as well as their conduct; (2) court personnel and attorneys, as officers of the court, have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice; and (3) because lawyers have special access to information through discovery and client communications, lawyers' extrajudicial statements pose a threat to the fairness of a pending proceeding, in that such statements are likely to be received as especially authoritative; thus, the First Amendment does not require a state to demonstrate a clear and present danger of actual prejudice or an imminent threat to fair trial before any discipline may be imposed on a lawyer who initiates a pretrial press conference.

Observation: In determining whether a rule adopted by a state's highest court to govern lawyers' extrajudicial statements to the press is void for vagueness as interpreted by the state court in a particular case, the question is not whether discriminatory enforcement occurred in the case at hand, but whether the rule is so imprecise that discriminatory enforcement is a real possibility; this inquiry is of particular relevance when one of the classes most affected by the rule is the criminal defense bar, which has the professional mission to challenge actions of the state.

500 Disclosure of classified or confidential information

Governmental restrictions on the disclosure of classified or confidential information, such as an authorization for a wiretap in a government investigation of criminal activity, are not, when concerned with a government official who has voluntarily assumed a duty of confidentiality, subject to the same stringent standards, under the Federal Constitution's First Amendment, that would be applied to efforts to impose restrictions on unwilling members of the public.

501 Disrespect or burning of United States flag

Utterances showing a disrespect for the flag of the United States have been held by the Supreme Court to be protected by the right of free speech. Flag-burning as a mode of expression also enjoys the full protection of the First Amendment, and the Supreme Court has invalidated on First Amendment grounds prosecutions of persons violating state and federal statutes prohibiting flag desecration.

The right of free speech has also been held violated by the action of a state board of education in requiring public school pupils to salute the flag of the United States while reciting a pledge of allegiance.

502 "Fighting words"

"Fighting words," which may be regulated without violating the First Amendment, is a small class of expressive conduct that is likely to provoke the average person to retaliate, and thereby cause a breach of the peace; if a reasonable onlooker would regard expressive conduct as a direct personal insult or an invitation to exchange fisticuffs, such speech is not entitled to First Amendment protection. In determining whether a message constitutes fighting words, and thus may be regulated without violating the First Amendment, a court is required to consider carefully the actual circumstances surrounding its display and ask whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. A state may constitutionally punish "fighting words" -- that is, words which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace -- under carefully

drawn statutes or ordinances which, by their own terms or as construed by the state's courts, are limited in their application to "fighting words" only, and are not susceptible of application to protected expression.

Observation: The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Thus, a city ordinance which was not limited to fighting words, or to obscene or opprobrious language, but prohibited speech that "in any manner" interrupted a police officer in the performance of his or her duties was unconstitutionally overbroad because the law provided the police with unfettered discretion to arrest individuals for words or conduct that merely annoyed or offended them.

503 Incitement to crime; breach of peace

The right of free speech contemplates the advocacy of legal and constitutional means to bring about changes in governments; the right is lost when it is abused by urging the use of illegal and unconstitutional methods. Thus, as a matter of principle, it has been recognized by the Supreme Court that utterances tending to incite to crime may be punished without infringing constitutional rights. The Supreme Court has also recognized that the right of free speech does not render immune utterances tending to incite an immediate breach of the peace or disorderly conduct or riot. And the listeners' probable reaction to a speech is not a content-neutral basis for regulation of speech in a public forum; speech cannot be financially burdened simply because it might offend a hostile mob.

On the other hand, there is a wide difference between incitement to crime and mere advocacy of law violation. A state and its courts may not make criminal the peaceful expression of unpopular views, and a conviction for breach of the peace may not stand if based either on the ground that the speech stirred people to anger, on the ground that it invited public dispute, or on the ground that it brought about a condition of unrest, and public gatherings, even where arguably of such a nature as to justify governmental intervention, may not be prevented by a prior restraint such as an ex parte court order, without notice to, and a hearing of, those affected thereby.

A state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the morals, and the degree of probability that the substantive evil actually will result. Stated opposition to the war in Vietnam, and approval of those attempting to avoid the draft, were not such incitements to crime as would permit a state legislature to bar a duly elected representative from occupying his seat.

504 Obscene matter

Obscenity is not within the area of constitutionally protected speech or press. To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the conception and purposes of the original First Amendment and is a misuse of the guarantees of free speech and free press. Commercial exposure and sale of obscene materials to anyone, including consenting adults, is not constitutionally protected and is subject to state regulation, and there is no constitutional barrier to prohibiting communications that are obscene in some communities under local standards, even though they are not obscene in others.

Observation: Obscenity offenses may be used as predicate acts under a state's RICO statute, even though the stiff penalties permitted under the RICO statute might cause some booksellers to practice self-censorship and to remove materials that are actually protected by the First Amendment from their shelves.

With regard to the scope of regulation of obscene material permissible under the First Amendment, the United States Supreme Court does not undertake to tell the states what they must do, but rather undertakes to define the area in which they may chart their own course in dealing with obscene material. Nevertheless, a state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech. The First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. However, the right to private possession of obscene material is restricted to possession in one's home and this right does not create correlative rights to give, receive, distribute, sell, transport, or import obscene material, even though such activities are to result only in private use or possession. The constitutional right to possess obscene material in the privacy of one's home depends on the right to privacy in the home, not on any First Amendment right to purchase or possess obscene materials. Thus, not only may the government prohibit the communication or importation of obscene materials for commercial distribution, but it may also constitutionally prohibit the importation of obscene material even though the importer claims that such material is for private, personal use and possession only.

505 Obstruction of war measures

The government's power to enact statutes, the effect of which is to curtail free speech, is greater in time of war than in time of peace because war opens dangers that do not exist at other times. When a nation is at war, many things that

might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as the war is being fought, and no court could regard them as protected by any constitutional right. To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the military forces may not be broken by seditious utterances; and freedom of the press may be curtailed so as to preserve military plans and movements from the knowledge of the enemy.

The prohibitions of the Selective Service Act against the alteration, forgery, or similar deceptive misuse of draft cards are clearly valid, and the courts have also rejected challenges to the constitutionality of the prohibition against knowingly destroying or mutilating a draft card; such provisions have been held not to violate a person's First Amendment right to freedom of speech, either on its face or as applied. The Selective Service System's policy of passive enforcement under which it would investigate and prosecute only those who had advised the Selective Service that they had failed to register or who were reported by others as having failed to register did not violate the First Amendment, where the policy furthered an important governmental interest and the policy placed no more limitation on speech than was necessary to ensure registration for the national defense.

A statute which makes it a criminal offense for any person, when the United States is at war, willfully to make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or willfully to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the Armed Forces, or willfully to obstruct the enlistment or recruiting service of the United States, to the injury of the service of the United States, has been held not to infringe the constitutional guarantees of freedom of speech or of the press, particularly in view of the stricter limitations of those freedoms during time of war.

506 Seditious, subversive, or treasonous activities or utterances

As a matter of principle, the Supreme Court has recognized that the right of free speech does not prohibit the punishment of utterances which threaten the overthrow of the government by unlawful means. However, this broad principle must be qualified by the requirements that there must be a clear and present danger to the government, or that advocacy of such unlawful acts must be directed to inciting or producing imminent lawless action and be likely to incite or produce such action. Moreover, even though the state may penalize utterances which threaten the overthrow of the government by unlawful means, a statute is invalid as infringing the right of free speech where it permits punishment for utterances made innocently with no intent to induce a resort to violence.

Observation: The so-called *Brandenburg* test, under which the government may punish the advocacy of illegal conduct only where such advocacy is directed to inciting or producing imminent lawless acts and is likely to incite or produce such action, applies to laws that forbid inciting someone else to use violence against third parties, but does not apply to statutes that prohibit someone from directly threatening another person.

The Supreme Court has held that the President, acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States.

The authority of the Federal Government to regulate and punish sedition and related offenses, subversive activities and matters affecting internal threats to national security, and treason has never been seriously questioned. In a celebrated case involving treason alleged to have occurred during World War II, it was held that the First Amendment did not prevent conviction of an American citizen for words spoken on a German broadcast, since the words were spoken to give comfort to the enemy. The constitutionality of the Espionage Act has been upheld, and it has been said that the communication of secret defense material to a foreign nation cannot, by any farfetched reasoning, be included within the area of First Amendment protected speech. And it has been held that this constitutional right was not violated by a provision in the Alien Registration Act for deportation of any alien who was, at the time of entering the United States, or had been at any time thereafter, a member of an organization that taught or advocated the overthrow of the government by force.

507 Terroristic threats

Statutes punishing "terroristic threats" or acts have been sustained as not violative of the First Amendment right to free speech. And a statute prohibiting a person from knowingly and willfully making any threat to take the life of or to inflict bodily harm upon the President of the United States is constitutional on its face, as the nation undoubtedly has a valid, even overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence; however, what is a threat must be distinguished from what is constitutionally protected speech. While the government may outlaw threats, the First Amendment does not permit the

government to punish speech merely because the speech is forceful or aggressive, since what is offensive to some is passionate to others.

508 Expressive conduct or symbolic or nonverbal speech; in general

A message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by a viewer to be communicative. Symbolic expression of this kind may be forbidden or regulated only if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest and if the interest is unrelated to the suppression of free speech. Thus, while verbal expression is, of course, protected, so, too, is "nonverbal expression" or "expressive conduct," or "symbolic speech," such as the use of funds to support a political candidate, the display of a flag or signs and banners, or a mode of dress or personal grooming, such as wearing a beard or a certain hair style, or by mere silent and reproachful presence in a public place.

Practice guide: The First Amendment perception and intent analysis to determine whether certain "speech" is constitutionally protected is not necessary when printed or spoken words, as opposed to symbolic expressions, are used.

509 Boycotts, pickets, and parades

Picketing, parades, or demonstrations carried on in a nonlabor context, when free from coercion, intimidation, and violence, are constitutionally guaranteed as free speech, although the First and Fourteenth Amendments do not afford the same kind of freedom to those who would communicate ideas by conduct as they afford to those who communicate ideas by pure speech.

A boycott intended to secure compliance by both civic and business leaders with demands for equality and racial justice and which is supported by speeches and nonviolent picketing, with the participants repeatedly encouraging others to join the cause, is a form of speech or conduct entitled to protection under the First and Fourteenth Amendments.

Observation: The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, but it may not proscribe particular conduct because it has expressive elements; a law directed at the communicative nature of conduct must, like laws directed at speech itself, be justified by a substantial showing of need that the First Amendment requires.

Public parading may constitute a method of expression entitled to First Amendment protection, but reasonable restrictions on the time, place and manner are permissible when necessary to further significant governmental interests. However, the organizers of a parade may not be required by the state to alter the expressive content of their parade. Therefore, a state court's application of a state public accommodation law, which prohibited discrimination on the basis of, inter alia, sexual orientation, so as to require the private organizers of a St. Patrick's Day parade to permit a group of gay, lesbian, and bisexual descendants of Irish immigrants to participate as its own parade unit, carrying its own banner, violated the organizers' First Amendment free speech rights. Since every participating unit affected the message that the organizers conveyed, the state court order essentially required the organizers to alter the expressive content of their parade, and had the effect of declaring the organizers' speech itself to be a public accommodation.

510 Cultural and artistic expression

Art and music, as forms of expression and communication, are also protected under the First Amendment. Entertainment, no less than political and ideological speech, is protected by the First Amendment and motion pictures, programs broadcast by radio and television, and live entertainment such as dramatic works all fall within the First Amendment guarantee.

Observation: Each medium of expression must be assessed for First Amendment purposes by standards suited to it, since each may present its own problems, and the fact that, by its nature, theater usually is the acting out, or singing out, of the written word, and frequently mixes speech with live action or conduct is no reason to hold theater subject to a drastically different standard.

511 Physical assaults and violence

A physical assault is not expressive conduct protected by the First Amendment, even though the person committing the assault intends to thereby express an idea. Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection.

512 Time, place, medium, and manner restrictions; in general

The right of free speech is guaranteed every citizen that he or she may reach the minds of willing listeners; to do so, there must be a lawful opportunity to win their attention. Hence, as a general proposition, the methods of communication may not be subjected to censorship; and the right of free speech is violated by an ordinance prohibiting the distribution of literature of any kind at any time, at any place, and in any manner without a permit from a city official, or by an ordinance banning from city streets all news racks containing commercial handbills, but permitting the distribution of

newspapers from similar news racks. Moreover, the exercise of one's liberty of expression in appropriate places may not be abridged simply because it may be exercised in some other place.

Observation: Mere speculation of harm does not constitute a compelling state interest justifying a limitation on the exercise of the right to free speech.

Regulations that burden speech incidentally or that control the time, place, and manner of expression must be evaluated in terms of their general effect and such regulations are not invalid under the First Amendment simply because there is some imaginable alternative that might be less burdensome on speech. An incidental burden on speech is no greater than is essential, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation, and so long as its validity does not depend upon the judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting a significant government interest.

Even so, people who desire to propagandize or protest have no right under the First Amendment to do so whenever, however, and wherever they please, since freedom of speech, while fundamental in our democratic society, does not comprehend the right to speak on any subject at any place and at any time. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions.

Accordingly, reasonable regulations as to the time, place, and manner of exercise of protected speech are constitutionally permissible where they are necessary to further significant governmental interests, provided they are evenhanded or nondiscriminatory, and that no undue burden or absolute prohibition is imposed on free speech.

Observation: The Federal Government has an interest in eliminating restraints on fair competition, even when individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.

The nature of a place and the pattern of its normal activities dictate the kinds of regulations of the time, place, and manner of expressive conduct that are reasonable; the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, weighing heavily the fact that communication is involved and that the regulation must be narrowly tailored to further the state's legitimate interest.

513 Media restrictions; print media

The freedoms of speech and press are not limited to particular media of expression. Since the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion, the liberty of the press is not confined to newspapers and periodicals; it necessarily embraces handbills and literature, such as pamphlets and leaflets, which have proved most effective instruments in the dissemination of opinion.

514 Broadcast media

The First Amendment protects free speech and press rights of the broadcast media, including radio and television (which includes television cable programmers and cable operators), and the Internet.

Observation: The Supreme Court has said that the fundamental technological differences between broadcast and cable television transmission renders the relaxed standard of scrutiny for broadcast regulation inapplicable to a First Amendment challenge of cable regulation, since cable television does not suffer from the inherent limitations of broadcast television arising from the scarcity of available broadcast frequencies compared to the number of would-be broadcasters.

515 Telemarketing

Limits may be placed on certain forms of telemarketing that reach homes and places of business. Thus, a state statute which regulates telephone automatic dialing and announcing devices (ADAD) for all purposes, subject to certain exemptions, is a permissible time, place, and manner restriction on speech. The prohibitory provision prescribes a method of communications, not its content, the exemptions do not improperly privilege some relationships over others, the state has a significant interest in protecting the public from voluminous ADAD calls which threaten residential privacy and disrupt workplaces, a no less restrictive means of accomplishing these governmental objectives is readily apparent, and such a statute leaves ample channels free to the public otherwise to disseminate messages.

516 Other media

The First Amendment protects free speech and press rights in connection with messages that appear on billboards and in motion pictures, and that are spoken or transmitted over the telephone or that are sent through the mail.

517 Place restrictions; public forums

If government property has by law or tradition been given the status of a public forum, the state's right to limit protected expressive activity thereon is sharply circumscribed and very limited. The government may enforce reasonable time,

place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Observation: Restrictions on private property are even less likely to be sustained. Thus, city ordinances which ban all residential yard signs, commercial and noncommercial, except for those displaying the residents' names and addresses and pertinent social security information, violate the First Amendment for failing to leave open alternative channels of communication of information, except those which are either ineffective (window signs) or costlier (newspaper advertisements).

Whatever occasion would restrain orderly discussion and persuasion, at appropriate times and places, must have clear support in some public danger, actual or impending, and only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. The right to use a public place for expressive activity may be restricted only for weighty reasons. The exact scope of the limitations which may validly be imposed upon the manner and place of utterance can be determined only by considering the specific facts involved in the cases adjudicated by the courts. First Amendment rights must always be applied in light of the special characteristics of the environment in each particular case. Thus, when the government seeks to regulate that which restricts content-neutral expressive activity in a public forum, the First Amendment requires that the regulation satisfy requirements as to time, place, and manner of restriction.

Although a traditional public forum does occupy a special position in terms of First Amendment protection, property covered by an ordinance prohibiting the posting of signs on certain public property, including any sidewalk, crosswalk, curb, curbstone, street lamppost, hydrant, tree, shrub, or certain other public property, has been held not to be a "public forum" subject to special First Amendment protection.

518 Limited public forums

Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by a speaker's activities. The right to communicate is not limitless; even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. Thus, the government's ownership of property does not automatically open that property to the public for First Amendment purposes. However, the Constitution forbids a state from enforcing certain exclusions from a forum generally open to the public, even if the state is not required to create the forum in the first place.

519 Distinctions between traditional public, limited public, and nonpublic forums

The right to use public or government property for one's private speech or expression depends on whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses. Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity or which has been expressly dedicated to speech activity is examined under strict scrutiny; however, where such property is not a traditional public forum and the government has not dedicated it to First Amendment activity, the regulation is examined only for reasonableness.

The three types of forums that may exist on government property, for purposes of a First Amendment claim challenging the government's restriction of protected speech by private persons on government property, are: traditional public forums, designated or limited public forums, and nonpublic forums. "Traditional public forums" are places such as streets and parks that by long tradition have been devoted to assembly and debate; "designated public forums" or "limited public forums" are those created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects; and "nonpublic forums" are government properties that are not by tradition or designation forums for public communication. In a traditional public forum, content-based restrictions on speech are valid only if necessary to serve a compelling state interest and only if narrowly drawn to achieve that end. However, reasonable, content-neutral time, place, or manner restrictions are permissible in a public forum.

Observation: The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse; even when the government opens a forum for

some speech, the forum does not become a public forum if the government did not intend to open the forum without limitation.

Speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. On the other hand, access to a nonpublic forum can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because the public officials oppose the speaker's view. Public property which is not by tradition or designation a forum for public communication may be reserved by the state for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Observation: Public property which is neither a traditional nor a designated public forum may still serve as a forum for First Amendment expression if the expression is appropriate for the property and is not incompatible with the normal activity of the particular place at that particular time.

520 Specific place restrictions; private property; private homes; shopping centers

The right to exercise First Amendment privileges may be legally restricted, under some circumstances, on private property by the owners of the property themselves, such as those who own a housing development or an apartment house.

For federal constitutional purposes, a privately owned and operated shopping center generally open to the public is not so dedicated to public use as to require the owner of the center to permit the distribution of handbills, circulars, or petitions unrelated to the shopping center's operations, or for the purpose of advertising a strike against one of the stores.

Caution: The states are free to set different rules for shopping centers if they so desire, and some have done so, since the United States Supreme Court has expressly ruled that the fact that the First Amendment does not prevent a private shopping center owner from prohibiting distribution on the center's premises of handbills unrelated to the center's operation does not limit each state's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.

Special respect for individual liberty in one's own home has long been a part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there. Thus, a city ordinance banning all residential signs except those falling within one of 10 exemptions has been held to violate a homeowner's right to free speech.

521 Public buildings and other public property

Peaceful demonstrations in public buildings as expressions of freedom of speech and freedom to petition the government for a redress of grievances have been upheld in some cases as constitutionally protected activities against infringement by state or local regulation, where the activity has been peaceful and has not obstructed the public's use of the building; but the decisions are not by any means uniform in this area, and peaceful distribution of literature in a public transportation terminal may not be interfered with. On the other hand, the courts have sustained statutes or regulations which either expressly or as applied, prohibited expression of views, assemblies, demonstrations, or protests on jail grounds, in or near a courthouse (including the United States Supreme Court), within or near a state capitol building, or on a city-operated transit system.

A statute forbidding trespass in a public building at specified times and under specified conditions does not infringe on First Amendment rights. A state statute prohibiting the solicitation of votes and displays or distributions of campaign materials within 100 feet of the entrance to a polling place, as a facially content-based restriction on political speech in a public forum, is subject to exacting scrutiny under the First Amendment: the state is required to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Observation: A time, place, or manner regulation is "narrowly tailored" to serve the government's legitimate content-neutral interest, as long as the means chosen are not substantially broader than necessary to achieve the government's interest; it is immaterial that the government's interest might be adequately served by some less-speech-restrictive alternative.

522 Public schools, colleges, and universities

The use of a public school by its students as a setting for the expression of their views on government policy, in a manner not substantially interfering with the normal functions and purpose of the school, has been held constitutionally protected from infringement by the school authorities. The First Amendment rights of speech and association extend to the campuses of state universities.

523 Streets, sidewalks, and parks

Streets, sidewalks, parks, and, to some extent, certain other public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising those rights cannot be denied broadly and absolutely. A town's streets, although narrow and of a residential character, are traditional public forums, and thus an ordinance prohibiting picketing before or about a residence or dwelling of any individual is required to be judged against stringent standards for restrictions on speech in public forums. Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums."

For purposes of a challenge to an ordinance banning sales of goods, such as message-bearing T-shirts, and services on streets and sidewalks, a city has substantial interests in eliminating the visual blight of vendor stands, assuring orderly movement of pedestrians on crowded sidewalks, and protecting local merchants from unfair competition, although their use may be subject to reasonable regulation under the police power. The distribution of written expression in a public park, for instance, can be made subject to reasonable time, place, or manner restrictions. Thus, a regulation and policy statement requiring a permit for the sale or distribution of printed matter within a national park are reasonable time, place, or manner restrictions under the First Amendment, where the National Park Service grants permits irrespective of content, the regulation and statement are narrowly tailored to serve a significant interest in maintaining the safety and attractiveness of park grounds, and alternative means to communicate are left open inasmuch as pamphlets can be sold or distributed without a permit on an adjacent boulevard and oral communication is also permitted. Certainly, protesters have no First Amendment right to cordon off a street, or an entrance to a public or private building, and allow no one to pass who does not agree to listen to their exhortations. And cities have a significant government interest in keeping the streets open at busy times in the week. Thus, a city ordinance prohibiting Saturday morning parades is a reasonable time, place, and manner restriction on speech, where the city establishes the fact of increased traffic at that time and proves that controlling such traffic is necessary to provide local citizens with access to doctors' offices, drug stores, and other businesses.

The government has a legitimate interest in ensuring that national parks are adequately protected, and if the parks would be more exposed to harm without a sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation on the manner in which a demonstration may be carried out. A ban upon sleeping in certain areas of national parks responds precisely to substantive problems legitimately concerning the government.

524 Time restrictions

There are few cases discussing the relationship of the time of day or day of the week as they relate to the exercise of First Amendment free speech rights, although it seems self-evident that certain rights that may properly be exercised in the afternoon, for instance, may be inappropriate or illegal at three o'clock in the morning. Nonetheless, the Supreme Court has held that the time of an utterance is particularly important in the case of radio or television broadcasting, inasmuch as the government has a compelling interest in protecting children from the effects of broadcasting patently offensive materials. The Court has upheld a federal statute allowing cable system operators to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Thus, whether a televised program is "patently offensive" may depend on the context, degree, and time of the broadcast. [n19]

525 Manner of regulation, restriction, or infringement of rights, generally

The permissible methods of free speech and press regulation may vary with the various means of utterance. The Supreme Court has stated that, in dealing with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method or manner by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. The procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. The Court has also held that complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, foreclose alternative means of disseminating certain information, and thus are particularly dangerous and warrant more careful constitutional review. While licensing and taxation have been the most common forms of regulation affecting First Amendment guarantees of freedom of speech and press, they are by no means the only ones. In fact, the Supreme Court has said that the government offends the First Amendment when it imposes any sort of financial burdens on certain speakers based on the content of their expression, and that when the government targets not the subject matter but the particular views taken by a speaker on a particular subject, a violation of the First Amendment is automatically inferred.

526 Canvassing; house-to-house distribution

It has been recognized that the most effective way of bringing literature intended for the dissemination of opinion to the notice of individuals is to distribute it to the homes of the people, and house-to-house distribution of written material is one of the principal and protected constitutional means of implementing the First Amendment right of communication. Regulation in the area of canvassing and soliciting must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. A municipality does have the power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing, however; and a narrowly drawn ordinance, which does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve such important interests without running afoul of the First Amendment. But a municipal ordinance which requires that any person desiring to canvass or solicit from house-to-house for a "recognized charitable cause" or for a "federal, state, county, or municipal political campaign or cause," must "notify the Police Department, in writing, for identification only," is unconstitutional. Also, the right of free speech is violated by a municipal ordinance absolutely prohibiting the distribution of literature from door to door or conditioning the permissibility of such distribution upon a permit to be granted by an administrative officer at his or her discretion, or upon payment of a flat, as distinguished from a mere nominal, license tax. Like principles apply where a whole town, having all the characteristics of any other American town, is owned by a private company or by the United States.

The fact that a licensing ordinance is construed to apply only to solicitation from house to house does not relieve it from the objection that, as applied to the dissemination of religious beliefs, it is an unconstitutional invasion of the rights of freedom of speech and press where the ordinance as drawn is not confined to the prevention of abuses or evils arising from that type of solicitation, but instead sets aside residential areas of the municipality as a zone prohibited to all solicitors unless a license tax is paid. A regulation which under the principles stated above unduly limits the house-to-house distribution of literature cannot be justified by the fact that fraudulent appeals may be made in the name of charity and religion, or that the inhabitants of the city, an industrial community, frequently work at irregular hours so that casual bell pushers might seriously interfere with their hours of sleep, or that burglars frequently pose as canvassers, thus creating a danger to property. [n39]

Observation: The balancing of the right to privacy and the right to free speech and publication involved in house-to-house canvassing is not required in the case of on-the-street publication. On a public way, the citizen must accept the inconvenience of political proselytizing as essential to the preservation of a republican form of government.

527 Licensing

As a general rule, any law subjecting the exercise of First Amendment freedoms to the prior restraint of a license infringes such freedoms. In the area of free expression, a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. The major First Amendment risks associated with unbridled licensing schemes are self-censorship by speakers in order to avoid being denied a license to speak and the difficulty of effectively detecting, reviewing, and correcting content-based censorship as applied without standards by which to measure the licensor's actions -- at least, in the absence of narrow, objective, and definite standards to guide the licensing authority, whatever the motive which induced its adoption, since any regulation which makes dissemination of ideas depend upon the broad discretionary approval of the distributor by an official constitutes administrative censorship in an extreme form. Thus, the doctrine forbidding unbridled discretion with respect to issuing a government permit for speech or speech-related activity requires that any limits on governmental discretion in the matter be made explicit by textual incorporation, binding judicial or administrative construction, or by well-established practice. The fact that a state may choose to license its liquor retailers does not authorize the state to condition a conferral of that benefit upon the surrender of the retailers' constitutional right to freedom of speech, and does not justify the state's complete ban on the advertising of retail prices of alcoholic beverages. So also the requirement of a permit or license has been held to violate the freedom of speech where it does not relate to or is not limited to printed matter.

A charitable solicitation statute's licensing requirement that professional fund raisers await a determination regarding their license applications before engaging in solicitation, while volunteer fund raisers or those employed by the charity could solicit immediately upon submitting an application, unconstitutionally permits unlimited delays in issuing licenses to professional fund raisers. However, in order to regulate the competing uses of public forums, the government may impose a permit requirement on those wishing to hold a march, parade, or rally, so long as the scheme does not delegate an overly broad licensing discretion to a government official and limitations on the time, place, and manner of speech are not based on the content of the message, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. And a license fee imposed by a city ordinance requiring street peddlers to register with the city and wear identification cards while they are engaged in peddling was not an impermissible prior

restraint of speech under the First Amendment, since the fees were charged to defray the costs of administrating the ordinance and the ordinance furthered compelling governmental interests in preventing fraudulent solicitations and giving citizens some assurance that they can identify and pursue peddlers who do engage in fraudulent or unlawful conduct.

Although raising revenue for police services is an important governmental responsibility of a county, it does not justify a county ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order during the event; and an otherwise unconstitutional ordinance permitting a government administrator to vary the permit fee for assembling or parading to reflect the estimated cost of maintaining public order is not rendered constitutional by a $ 1,000 cap on the permit fee, since a tax or license fee based on the content of speech does not become more constitutional because it is a small tax.

Proof of an abuse of power in a particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. Consequently, the availability of a judicial remedy for abuses in the system of licensing does not obviate the constitutional objections to a statute that authorizes a previous restraint upon the freedom of speech. The fact that a licensing ordinance is nondiscriminatory does not relieve it from attack upon the ground that it violates the constitutional guarantees of freedom of speech and press. A licensing system need not effect total suppression in order to create a prior restraint on free speech. For instance, an ordinance requiring a license in connection with the operation of sexually oriented businesses, as enforced, was held by the Supreme Court to be an unconstitutional prior restraint on the licensees' First Amendment rights, because the ordinance lacked a necessary limitation on the period of time during which the licensor had to make a decision whether to issue a license, during which the status quo was maintained, and the ordinance did not provide the possibility for prompt judicial review in the event the license was erroneously denied. The power to revoke a license for the exercise of a constitutional right is also an unconstitutional restraint on free speech.

Despite the foregoing general statements, the requirement of a license or permit is not always per se a violation of freedom of speech or press, and many regulations adopted under the police power have been sustained. Examples are regulation of the use of public places such as streets and highways, and public parks, squares, and commons, and the regulation and licensing of such specific matters as motion pictures and radio and television broadcasting, or of particular professions and occupations.

528 Noise regulations

Under the rule that reasonable regulations as to the manner of exercise of protected speech are constitutionally permissible where they are necessary to further significant governmental interests and are nondiscriminatory, it has been held that the use of sound trucks or sound amplification devices such as loudspeakers, bull horns, and so forth, may be regulated or limited. In fact, the Supreme Court has said that, while music is a form of protected speech, the government nonetheless has a substantial interest in protecting its citizens from unwelcome noise, and may act to prevent such noise even in traditional public forums such as city streets and parks. Similarly, loud shouting and cheering designed to disrupt, rather than communicate, may be prohibited generally, but a prohibition of all loud speech is not permissible. As illustrative of this rule, the Supreme Court has held that limited noise restrictions imposed by a state court injunction, restraining antiabortion protesters outside an abortion clinic from singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns, or sound amplification equipment, or making other sounds within earshot of the patients inside the clinic, burdened no more speech than was necessary to ensure the health and well-being of patients at the clinic. The Court has also held that a municipal noise regulation designed to ensure that musical performances at a public band shell do not disturb the surrounding residents is a "content-neutral" time, place, or manner regulation, which will be upheld as long as it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.

529 Taxation

As a matter of principle, it has been recognized by the Supreme Court that the power to impose a tax on the exercise of free speech or press is as potent as a power of censorship, and that such a tax restrains in advance the constitutional liberties and inevitably tends to suppress their exercise. Thus, the Supreme Court has stated that official scrutiny of the content of publications as a basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press, and that, absent a compelling justification, the government may not exercise its taxing power to single out the press. However, a state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue so long as those statutes operate evenhandedly on all similarly situated. While differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of

particular ideas or viewpoints, the fact that cable television is taxed differently from other media does not by itself raise any First Amendment concerns. A state's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate the First Amendment. A tax generally applied to receipts from the sale of all tangible personal property and a broad range of services unless within a group of specific exemptions is not unconstitutional, where there is no indication that the state had targeted cable television in any purposeful attempt to interfere with its First Amendment activities, and where the sales tax is not content based.

Observation: No free speech question is presented by an income tax regulation which denies taxpayers a deduction for expenditures made to promote or defeat legislation.

530 Other manner restrictions

Among other types or subjects of regulation which have affected -- most often, within permissible constitutional limits, but occasionally not -- the First Amendment freedoms of speech or press are --

-- depriving convicted criminals of income derived from writing books or other publications about their crimes.

-- zoning regulations.

-- postal regulations.

-- regulation of lobbying.

-- regulation of press coverage of judicial proceedings, including presence at a trial and the use of cameras or broadcasting facilities.

-- regulation of press coverage of legislative proceedings.

-- regulations requiring loyalty oaths or affidavits. Under the First Amendment, it is presumed that speakers, not the government, know best what they want to say and how to say it. Thus, a state's regulation of charitable solicitation practices by professional fund raisers, which defined the reasonableness of fees using percentages of receipts collected, was not narrowly tailored to achieve the state's valid interest in protecting charities, since a charity might choose a particular type of fund-raising drive or a particular solicitor expecting to receive a large sum as measured by total dollars, rather than a percentage of the dollars remitted, or might choose to engage in the advocacy or dissemination of information during solicitation or to seek the introduction of the charity's officers to the philanthropic community during a special event.

531 Generally

The First Amendment to the Federal Constitution provides that "Congress shall make no law ... abridging ... the right of the people peaceably to assemble and to petition the Government for a redress of grievances." In fact, a lawsuit itself can be a form of constitutionally protected petition for the redress of grievances. The right to petition the government for redress of grievances -- in both judicial and administrative forums -- is among the most precious of liberties safeguarded by the Bill of Rights. It is fundamental to the very idea of the republican form of government. The right is substantive rather than procedural, and therefore cannot be obstructed, regardless of the procedural means applied. While the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis. The solicitation of signatures for a petition involves protected speech.

Although the First Amendment itself is merely a limitation against federal abridgment of the right, the Due Process Clause of the Fourteenth Amendment prevents any denial of the right by the states. Moreover, in the Bills of Rights of most of the states are also found provisions asserting the right of the people to assemble and to consult together for the common good and to petition the government for redress of grievances. Like others, prisoners have a constitutional right to petition the government for redress of their grievances, which includes a reasonable right of access to the courts. The First and Fourteenth Amendments safeguard the right of free assembly by limitations on governmental action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The right to petition extends to all departments of the government; the right of access to the courts is but one aspect of the right of petition.

532 Nature and extent of right

The right of the people to assemble for the purpose of petitioning for a redress of grievances or for anything else connected with the powers or the duties of the government is an attribute of citizenship, and thus it is a right and privilege secured to all citizens of the United States by the Constitution, irrespective of their race or ideology. It is a right cognate to those of free speech and free press and is equally fundamental; the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights, and these rights are

intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press, all these, though not identical, being inseparable. In construing the First Amendment, it is irrelevant whether statutory rights were created by Congress or by the state, because freedom of speech, petition, and assembly under the First and Fourteenth Amendments, is, of course, as extensive with respect to assembly and discussion related to matters of local concern as it is to matters of federal concern. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation with respect to public affairs and to petition for a redress of grievances. The First Amendment's ban against Congress "abridging" the right peaceably to assemble and to petition creates a preserve where the views of the individual are made inviolate.

The right of assembly guaranteed in the Federal Constitution to the people is not restricted to the literal right of meeting together "to petition the government for a redress of grievances." And the grievances for redress of which the right of petition was ensured, and with it the right of assembly, are not solely religious or political ones. Moreover, the rights under the First and Fourteenth Amendments guaranteeing freedom of assembly and petition are not confined to verbal expression, and embrace appropriate types of action, including protest in a peaceable and orderly manner by silent and reproachful presence in a place where the protestant has every right to be.

Under the First Amendment, groups can unite to assert their legal rights as effectively and economically as practicable. Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment, and neither state nor federal officers -- whether executive, legislative, or judicial -- may assume the power to deny or curtail the right of the people to petition the government. On the other hand, First Amendment rights may not be used as the means or the pretext for achieving substantive evils which the legislature has the power to control.

533 Application of rights in civil actions

The right to petition the government for redress of grievances has been involved in several cases arising from the efforts of groups or associations to advise their members of their legal rights, and to refer them to competent attorneys. The Supreme Court has upheld the validity of such referral services in these cases, relying at least in part on the First Amendment right to petition.

In several private antitrust actions where plaintiffs alleged concerted efforts to destroy competition by exerting influence on the legislative and executive branches of government, or upon administrative agencies carrying out their commands, the Supreme Court has had to consider the right to petition guaranteed to the defendants by the First Amendment and has held the right paramount, even when asserted by a group or association for the purpose of destroying competition.

The United States Supreme Court has also considered the First Amendment right to assemble or petition in the context of other civil actions, holding the right applicable so as to forbid a loyalty oath of teachers which had the effect of preventing their seeking to alter the form of government. But an ordinance requiring municipal employees to take an oath of nonadvocacy of, and nonaffiliation with any group advocating, overthrow of the government, and requiring an affidavit stating whether the employee is now or ever was a member of the Communist Party, was held valid as not being a deprivation of freedom of assembly or of the right to petition for a redress of grievances. State courts faced with the question of validity of loyalty oaths as against claims of violation of freedom of assembly have sustained them as applied to public officers and employees and as to candidates for public office, but a particular oath requirement imposed on applicants for the use of a public school auditorium for a public meeting or forum has been held to be unconstitutional; and a resolution by a federally aided housing authority requiring tenants to execute a certificate of nonmembership in listed organizations has been held unconstitutional as violating First Amendment rights and corresponding rights under the state constitution.

The right to petition was held not to have been denied by a state law providing that no one could be refused an opportunity to obtain employment because he was or was not a member of a labor organization. A school district's termination of a teacher did not constitute retaliatory deprivation of her First Amendment right to petition the government for redress of grievances, absent any showing of a causal connection between her termination and her filing of grievances against the district, where the teacher was properly terminated for insubordination and unprofessional conduct.

534 Application of rights in criminal actions

The United States Supreme Court has had occasion to protect the First Amendment right to petition in reviewing criminal prosecutions alleged to have infringed that right. With respect to peaceable public protest, the Supreme Court, in reviewing criminal cases, has taken a liberal view of the right of the people to assemble and to protest publicly wrongs

done them, relying heavily on the First Amendment right to petition the government for a redress of grievances, in conjunction with other First Amendment rights. Mere public intolerance or animosity cannot be the basis for abridgment of the constitutional right of free assembly, and a state may not make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people.

Statutes defining the offense of disturbing meetings, at first aimed solely at the protection of religious meetings, have gradually been extended to the protection of other assemblies, until they now shield all lawful meetings from the willful and tumultuous conduct of persons attempting to make a disturbance, and such statutes have been held to represent a proper exercise of the police power. Similarly, statutes punishing unlawful assemblies, or the aiding and abetting of such assemblies, usually are held to be constitutional, unless they delegate enforcement authority without laying down any rules or standards properly within the police power or where they grant local authorities absolute discretion in preventing the gathering or congregation of persons. Statutes or ordinances regulating breach of the peace and disorderly conduct sometimes raise questions of violation of constitutionally protected rights of freedom of assembly. Similarly, criminal trespass statutes may affect First Amendment rights to freedom of assembly or petition.

535 Limitation and regulation; generally

The right to assemble freely and the right to petition are not absolute and unlimited rights; like all other fundamental constitutional rights, they are subject to some limitations and to reasonable regulations to preserve and protect the general welfare. Such rights are no more sacred than the right of free speech, and as there may be an abuse of the right of free speech, so may there be an abuse of the rights of assembly or petition. Thus, violent assemblies and demonstrations do not enjoy First Amendment protection. And the First Amendment's petition clause, which guarantees the right of the people to petition the government for a redress of grievances, does not provide absolute immunity to a defendant who is charged with expressing libelous and damaging falsehoods in letters to the President of the United States regarding a candidate for public office, and does not provide an absolute immunity from damages for libel. Moreover, First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.

Freedom of assembly is dependent upon the power of constitutional government to survive. However, the power of the state to abridge freedom of assembly is the exception rather than the rule. It must find justification in a reasonable apprehension of danger to organized government; the limitation upon individual liberty must have an appropriate relation to the safety of the state. Freedom of assembly is susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect, or, as it has sometimes been said, there must be a "clear and present danger" of some substantive evil that the legislature has a right to prevent.

536 Requirement of license or permit

A regulation requiring a permit for processions or parades does not violate the right of free assembly where it is determined to be a reasonable regulation for legitimate traffic considerations, and an ordinance prohibiting canvassing or soliciting without first registering with the chief of police and procuring a permit has been held not to abridge the First Amendment freedom of assembly where the enactment focused on door-to-door activity, thus shifting emphasis to "conduct" traditionally surrounded with lesser protection than "pure speech," where persons desiring to canvas or solicit from door to door might do so simply by identifying themselves to the chief of police by providing information easily obtainable by the applicant, and where deterring use of canvassing to gain access to homes for criminal purposes and maintaining quiet and privacy for residents were "legitimate objects" of municipal concern.

On the other hand, the courts will strike down regulations requiring permits where they constitute an arbitrary and unreasonable prior restraint upon the right of free assembly. Precautionary censorship is equally objectionable whether imposed by a statute making criminal the assembly of persons or organizations whose objects and affiliations are disapproved, or by a statute requiring an administrative board to deny necessary permits for such meetings, as where the meeting is sought to be held in a public school. The fact that citizens have been annoyed by addresses made in city parks and public grounds does not warrant interference with the rights of free expression and assembly by an ordinance prohibiting such addresses except by permission of the city manager.

537 Requirement that petition circulators be unpaid

The circulation of a petition to amend a state's constitution involves "core political speech," for which the First Amendment protection is at its zenith. The solicitation of signatures for a petition involves protected speech. For First Amendment purposes, circulation of an initiative petition necessarily involves an expression of desire for political change and a discussion of the merits of the proposed change. Therefore, a state's prohibition against paying the circulators of initiative or referendum petitions restricts access to the most effective, fundamental, and perhaps economical avenue of polit-

ical discourse, namely, direct one-on-one communication, and involves an unconstitutional inhibition on "core political speech." A refusal to permit payment to the circulators of an initiative petition to amend a state constitution restricts political expression in two ways: (1) it limits the number of voices who can convey the message, the hours they can speak, and the size of the audience; and (2) it decreases the likelihood that its proponents will garner the necessary signatures. The freedom of the proponents of an initiative petition to employ a means other than paid circulators to disseminate their ideas does not take their speech through petition circulators outside First Amendment protection, and does not make the burden on speech acceptable.

538 Restrictions as to place or time

People who want to propagandize their protests or views have no constitutional right to do so whenever, however, or wherever they please. Not every parcel of publicly owned property is a suitable or available place for the exercise of the constitutional rights of citizens to assemble and petition their government or express grievances. Thus, for example, denial of the right to go on federal property to express grievances against the United States government does not violate the constitutional right to petition the government where the property in question is enclosed by a fence with a locked gate, with limited access for military use only. Similarly, a prison or jail is not a facility generally open to the public, so that demonstrators may properly be arrested and prosecuted for malicious trespass, and priests may properly be denied admission for the purpose of conducting religious services and offering religious counseling to prisoners, without violation of the right to peaceably assemble. With respect to the prisoners themselves, however, denial or undue restriction of their reasonable access to the courts for redress of grievances would constitute a denial of due process guaranteed by the Fourteenth Amendment. A precise, narrowly-drawn statute prohibiting picketing and parading in or near a courthouse is a proper and constitutional regulation of the right of free assembly necessitated by the state's interest in protecting the judicial process. The right of the public authorities to prohibit gatherings or congregations of persons during the prevalence of an epidemic, and for such purpose to close or require the closing of public places or institutions, has frequently been recognized or assumed. On the other hand, access to the streets, sidewalks, parks, and other similar public places for the purpose of exercising First Amendment rights cannot constitutionally be denied broadly. Under the First and Fourteenth Amendments, a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; but a municipality may not discriminate in its regulation of such expression on the basis of the content of that expression. A regulation which authorizes punishment of constitutionally protected conduct and subjects exercise of the right of assembly to an unascertainable standard violates the right of free assembly.

539 Generally; origin and nature of right

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances." Nowhere does the word "association" appear. Yet the United States Supreme Court has concluded that a right to freedom of association exists as one of the necessary concomitants to the more specific guarantees of the First Amendment -- in short, as a penumbral right, making the others more secure, it being the case that one may not exercise the right to assemble alone, and that frequently the effective exercise of the freedoms of speech, press, and petition requires group or associational activity. Thus, it is now accepted that the freedom to associate with others for expressive purposes is implicit in the First Amendment's free speech guarantee.

Observation: It is generally conceded that the right of association may be traced to Justice Harlan's opinion for the Supreme Court in NAACP v. Alabama. In a number of prior opinions, however, the Supreme Court had mentioned, or had hinted in some rather vague way, that a "right of association" existed.

The constitutional right to free association for expressive purposes is an instrumental one; expressive association is protected as an indispensable means of preserving other individual liberties. The constitutional right to associate also includes the right not to associate. The First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any state. The Supreme Court has noted that the ability and opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed individuals as against the government.

Caution: On a constitutional level, the right to free association is not absolute; a compelling governmental interest, such as eliminating discrimination against women, will override the right to expressive association.

Freedom of association is now accepted as being as basic as the right to trial protected by the Fifth Amendment; and it is an inseparable aspect of the liberty assured by the due process clause. Freedom of association, the Supreme Court has said, is a constitutional right which is included in "the bundle of First Amendment rights" made applicable to the states

by the Due Process Clause of the Fourteenth Amendment. And the Court has also said that among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs, and while this freedom of association is not explicitly set out in the First Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. The First Amendment protects political association as well as political expression; the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas, which freedom encompasses the right to associate with the political party of one's choice. The Constitution protects free association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, and without regard to the calling of the person claiming the right.

540 Aspects of right

With regard to the right of association, the United States Constitution affords two distinct freedoms: freedom of "intimate association" (the choices to enter into and maintain certain intimate human relationships) and freedom of "expressive association" (association for the purposes of engaging in activities protected by the First Amendment such as speech, assembly, petition for the redress of grievances, and the exercise of religion). The constitutional right to intimate association guarantees an individual the choice of entering into an intimate relationship free from undue intrusion by the state. Whether that right extends to relationships other than those that attend the creation and sustenance of a family depends on the extent to which those relationships share the characteristics that set family relationships apart -- small, select, and secluded from others. The second type of associational freedom -- "expressive association" -- protects the right of individuals to associate for purposes of engaging in activities protected by the First Amendment, such as speech, assembly, exercise of religion, or petitioning for the redress of grievances.

Freedom of association includes, as one of its most important aspects, the right to engage in group advocacy of various kinds of political or governmental beliefs and ideas. This freedom is clearly not limited to the advocacy of views which are popular or noncontroversial; it extends as well to the protection of associations advocating unpopular, controversial, dissident, or unorthodox views. Freedom to associate for the advancement of ideas is not limited to those ideas which are political in nature, however, for the right extends also to group assertion of mutual economic or legal interests, to group associations for social purposes, and probably to others as well.

Observation: The Supreme Court has held that a city ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18 did not infringe on the First Amendment right of association. The Court held that the dance hall patrons were not engaged in any form of intimate or expressive association, and that there is no generalized right of "social association" that includes chance encounters in dance halls.

The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective. Furthermore, the First Amendment right of association does not require the government to furnish funds to maximize the exercise of the right of association or to minimize any resulting hardship by giving food stamps to a qualifying striker who is a member of a labor union.

541 Assertion of right

No citation of authority is needed to support the proposition that an individual may assert on his or her own behalf his or her constitutional rights, including his or her right to freedom of association. The right of an association to assert constitutional rights on behalf of its members is perhaps not so obvious. However, it has been held, at least under the circumstances in some cases, that an association has standing to litigate questions relating to the right of its members to freedom of association. Thus, the Supreme Court has held that private schools have standing to assert, on behalf of their patrons, arguments that a federal statute outlawing such schools' exclusion of black students solely on the basis of race violates the constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his or her children. And the Court has recognized the standing of organizations to assert the constitutional rights of their members. An association also may assert the right to freedom of association on its own behalf, at least where it is engaged in constitutionally protected activities.

542 Generally; protection against infringement of right by state regulation

The right to freedom of association, though protected by the First Amendment, is not absolute. However, this right may not be circumscribed by the federal or state governments, or any of their subdivisions or agencies, except upon a showing that a substantial or compelling and legitimate governmental interest requires an interference with the right. Thus, whenever the constitutional freedom of association is asserted against the exercise of valid governmental powers, a reconciliation must be effected, requiring an appropriate weighing and balancing of the respective interests involved.

Practice guide: To determine whether a law violates the Constitution, a court first examines whether the challenged law burdens the right of association; if it does, the court then gauges the character and magnitude of the burden on the

plaintiff and weighs it against the importance of interests that the state proffers to justify the burden, examining not only the legitimacy and strength of the state's proffered interests, but the necessity of burdening the plaintiff's rights in order to protect those interests. If the burden imposed by the law on plaintiff's constitutional right to association is severe, the state's interest must be compelling and the law must be narrowly tailored to serve the state's interests.

Where it has been shown that a substantial governmental interest does require interfering with the otherwise absolute right to freedom of association, the courts have held such infringements to be justified. However, even where it has been amply demonstrated that a substantial governmental interest requiring some form of interference with the right to freedom of association is or may be involved, it must be shown by the government that the particular form of regulatory interference it selected is not unnecessarily broad, and that it is precisely drawn to accomplish the goal it was intended to accomplish. Where it has not been shown that a substantial governmental interest required interfering with the otherwise absolute right to freedom of association, the courts have held such infringements not to be justified. Governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights. And the right to free association may be infringed, even though unintentionally, by many forms of governmental action.

It is improper for a state, or any of its subdivisions or agencies, to condition a benefit on the recipient's agreeing to relinquish any of his or her constitutional rights. Thus, it has been held that the state may not withhold benefits which it has the authority to award on the condition that a potential recipient agree to give up some measure or facet of his or her constitutionally protected right to freedom of association. However, it is not improper for a state to condition a benefit on the recipient's (1) giving up or agreeing to give up an activity or association which is not protected by the Constitution, or (2) agreeing to answer questions about his or her associational activities which the state has a right to ask.

543 Relationship between state regulation and legality of association's aims or goals

In its decisions in the area of associational freedom, the Supreme Court has been careful to distinguish between those organizations having lawful, but unpopular, goals, and those which have both lawful and unlawful goals. Thus, it is quite clear that the right to freedom of association is not limited solely to those groups espousing views or having goals which meet with the approval of the majority of citizens, for the right to freely associate extends to those groups which unite to pursue any lawful goal, however unpopular that goal may be. However, as in the case of individuals, some organizations are not easily typed as being "lawful" or "unlawful," for many of them have both lawful and unlawful goals. With regard to such groups, the Court has taken the position that the government may regulate the unlawful aspects of such groups, but may not circumscribe their lawful aspects without showing a substantial governmental interest in doing so.

An individual's exercise of his or her right to freely associate with others may not be circumscribed by the state solely because the association results in the abstract advocacy of illegal aims. In order for the state to lawfully interfere with an association which advocates illegal goals, the advocacy must be of the sort which is calculated to incite persons to perform illegal acts, and which is likely to lead toward the accomplishment of the illegal goals.

Although agreements to engage in illegal conduct undoubtedly possess some element of association, the state may ban such agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it or on any underlying conduct constitutional immunities that the First Amendment extends to speech.

544 Right to anonymity or associational privacy

One highly important aspect of the right to freedom of association is the right to privacy in one's associations, and this is especially true where one associates with others who espouse dissident, radical, or unpopular views. As with freedom of association generally, however, the right to associational privacy is not absolute. Nonetheless, the state may not require an individual to disclose his or her private associational relationships except where such disclosure is compelled by a valid and legitimate state interest. The Supreme Court has recognized that where there is no likelihood that deterrence of an individual's right to freedom of association will result from foreseeable private action, the right of an individual to associational privacy is less obvious.

In a suit involving former President Richard Nixon, the Supreme Court held that a federal statute requiring the Administrator of General Services to take custody of former President Nixon's papers and tape recordings and to promulgate regulations for public access to such materials, subject to screening of the materials by government archivists to return

private papers to the former President, was not unconstitutional as substantially interfering with or chilling the former President's First Amendment rights of associational privacy and political speech.

Where a statute or ordinance requires, or a governmental official demands, that an organization's membership lists be made public, where such requirement bears no rational relation to the interest which is asserted by the state to justify such disclosure, and where, because of community temper, publication might prejudice members whose names were sought, it has been held that disclosure cannot constitutionally be compelled. Similarly, the right of free association bars the state from requiring an organization to disclose the name and address of each resident of the state who has made donations to the organization. But where it has been shown that the state has a subordinating interest in obtaining the names of an organization's members, which interest is sufficiently strong to warrant requiring such information to be given, it has been held constitutionally permissible for a state to seek to obtain a group's membership lists.

545 Guilt by association

One aspect of the right to freedom of association is the question whether one who associates himself with others can be held criminally liable because some of his or her associates, or perhaps all of them, either advocate the commission of, or actually commit, illegal acts. It is now clear from a number of the Supreme Court's decisions involving freedom of association that one may not be presumed guilty because of the company he or she keeps. The Court has taken the view that persons who join an association, but who neither subscribe to those of its purposes which are illegal nor participate in those of its activities which are unlawful, cannot be condemned merely because some of the members of the association subscribe to certain illegal purposes or participate in certain unlawful activities. The Supreme Court has also held that the unlawful aims and illegal activities of a national organization may not arbitrarily be attributed to a local chapter of the national organization. Each such local chapter must be judged on its own merit and can be restricted or banned only upon a showing that the local chapter subscribes to the unlawful aims of the national group and intends to participate in the national group's illegal activities.

546 Forced and prohibited associations

The right to associate or not to associate with others solely on the basis of individual choice, not being absolute, may conflict with a societal interest in requiring one to associate with others, or to prohibit one from associating with others, in order to accomplish what the state deems to be the common good. The Supreme Court, though rarely called upon to examine this aspect of the right to freedom of association, has nevertheless established certain basic rules which will cover many situations involving forced or prohibited associations. Thus, where a sufficiently compelling state interest, outside the political spectrum, can be accomplished only by requiring individuals to associate together for the common good, then such forced association is constitutional. But the Supreme Court has made it clear that compelling an individual to become a member of an organization with political aspects, or compelling an individual to become a member of an organization which financially supports, in more than an insignificant way, political personages or goals which the individual does not wish to support, is an infringement of the individual's constitutional right to freedom of association. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate; it is not merely a tenure provision that protects public employees from actual or constructive discharge. Thus, First Amendment principles prohibit a state from compelling any individual to associate with a political party, as a condition of retaining public employment. The First Amendment protects nonpolicymaking public employees from discrimination based on their political beliefs or affiliation. But the First Amendment protects the right of political party members to advocate that a specific person be elected or appointed to a particular office and that a specific person be hired to perform a governmental function. In the First Amendment context, the political patronage exception to the First Amendment protection for public employees is to be construed broadly, so as presumptively to encompass positions placed by legislature outside of "merit" civil service. Positions specifically named in relevant federal, state, county, or municipal laws to which discretionary authority with respect to enforcement of that law or carrying out of some other policy of political concern is granted, such as a secretary of state given statutory authority over various state corporation law practices, fall within the political patronage exception to First Amendment protection of public employees. However, a supposed interest in ensuring effective government and efficient government employees, political affiliation or loyalty, or high salaries paid to the employees in question should not be counted as indicative of positions that require a particular party affiliation.

Where a sufficiently compelling state interest can be furthered only by prohibiting individuals from associating together, then such prohibited associations are constitutional. However, even though the state may have a legitimate interest in prohibiting certain kinds of associations, it cannot impose unreasonable conditions in prohibiting them.

547 Attorneys; compelled association with bar groups

A state may legitimately require all attorneys practicing law within such state to be dues-paying members of an integrated state bar association.

548 Inhibited associations

Although the decisions of the Supreme Court involving the questioning of applicants for membership in a state bar as to their past or present associational ties appear to have reached conflicting results as to the extent to which bar committees may require applicants to divulge their past or present associations, a synthesis of the Court's view appears to be that a private inquiry may properly be made by a committee of the bar for the purpose of discovering whether an applicant has actively participated in, or has helped organize, groups which espouse the violent and unlawful overthrow of the government, and whether the applicant himself espouses such views and intends to assist in accomplishing such goals.

Bar associations may not, under the guise of preventing common-law barratry, champerty, or maintenance, prevent members of the bar from serving as the legal spokesmen for groups of individuals who have associated together for the purpose of vindicating their mutual legal interests.

549 Labor unions and union members

In some industries it is now common for employers and labor unions to enter into "union shop" agreements requiring an employee to join a union at the time of his or her hiring or shortly thereafter as a condition of employment. In spite of the obvious advantages to the union in procuring such an agreement, requiring workers to belong to labor unions introduces an element of forced association into labor agreements. However, where the law so provides, workers may be required to belong to labor unions as a condition of their employment, so long as such workers are required to render nothing other than financial support to the union and so long as the unions themselves do not attempt to use closed or union-shop agreements as vehicles for imposing ideological conformity.

Observation: Such interference with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as exists by compelling the employee to financially support a union as the employee's bargaining agent is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress; the furtherance of the common cause leaves some leeway for the leadership of the group, and as long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his or her financial support merely because he or she disagrees with the group's strategy.

It is also clear that the right to freedom of association protects the right of workers to receive legal assistance rendered by union-paid or union-recommended attorneys in the assertion of the workers' legal rights derived from their employment. However, the Supreme Court has held that union members' First Amendment rights to associate with their families were not infringed by a statutory amendment precluding households from becoming eligible for food stamps if a member of the household were on strike and precluding an increase in the allotment of food stamps the household was receiving because the income of the striking member had decreased.

Under the First Amendment, teachers who are not members of a union authorized as the collective-bargaining representative of teachers in the district have an absolute right to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the new media, and First Amendment concepts are violated by prohibiting such nonunion teachers, who have views different from the union as to a collective-bargaining agreement under negotiation with the school board, from communicating those views directly to the decision-making body charged by law with making the choices raised by the union's agreement demands.

550 Minority group organizations

Reviewing state statutes designed to compel minority organizations to identify their members, the Supreme Court has concluded that where no compelling state interest has been shown to warrant such disclosures, members of minority group organizations which espouse lawful, but unpopular, views have a right to remain anonymous. The Supreme Court has also held that minority group organizations may provide legal services to their members for the purpose of assisting them in the assertion of their legal rights.

551 Political parties and organizations; in general

The freedom of association guaranteed under the First Amendment protects partisan political organizations and parties, as well as the right to vote and the right to associate for political purposes. As a general rule, state laws that restrict a political party's access to the ballot always implicate substantial voting, associational, and expressive rights protected by the First and Fourteenth Amendments. These are fundamental rights under the Constitution, but these rights are not absolute.

These rights mean not only that an individual voter has the right to associate with a political party of his or her choice, but also that a political party has the right to identify people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences. Therefore, a state may not ban primary endorsements, because this constitutes a violation of the First Amendment right to free speech; such a ban prevents the party's governing bodies from stating whether a candidate adheres to the tenets of the party or whether the party officials believe that a candidate is qualified for the position sought, which directly hampers the ability of the party to spread its message, and it hamstrings voters seeking to inform themselves about candidates and campaign issues.

In cases involving minor political parties, the Supreme Court has made it clear that the right to freedom of association protects the right of individuals to associate together in the formation of new political parties for the purpose of advancing ideas and beliefs, and that such parties and their candidates are entitled to places on the ballot, subject only to reasonable restrictions or requirements imposed by the states to protect their legitimate interests of ensuring that elections are carried out in a proper and orderly fashion.

Regulations of parties, elections, and ballots which impose severe burdens on plaintiffs' associational rights must be narrowly tailored and must advance a compelling state interest; lesser burdens, however, trigger less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Observation: Ballot access restrictions must be assessed as a complex whole; because it is rare that a rule which requires a party to demonstrate a particular percentage of support in order to secure or retain ballot access would be unconstitutional per se, a reviewing court must determine whether the totality of the state's restrictive laws taken as a whole imposes an unconstitutional burden on voting and associational rights. Restrictions on access to the ballot burden two distinct and fundamental rights, the right of individuals to associate for advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Thus, a state law requiring independent candidates and new political parties to obtain more than 25,000 signatures is unconstitutional, as such a large number serves no compelling state interest.

A statute requiring each major political party to have a state committee consisting of two persons from each county in the state does not, by so restricting the composition of the state committee, violate the right of members of a political party to freedom of association.

552 Political contribution limitations

The decisions of the Supreme Court relating to laws which place contribution limitations on the right of persons or political committees to contribute to political campaigns present a mixed picture. Those provisions of the Federal Election Campaign Act which impose ceilings on political contributions, according to the Court, do not violate First Amendment speech and association rights, but are supported by substantial governmental interests in limiting corruption and the appearance of corruption.

Observation: The test announced in Buckley v. Valeo for safeguarding the First Amendment interests of minor parties and their members and supporters by exempting minor parties from compelled disclosure of their contributors' names if disclosure would subject them to threats, harassment, or reprisals applies not only to the compelled disclosure of campaign contributors, but also to the compelled disclosure of the names of recipients of campaign disbursements. On the other hand, the Supreme Court, in a more recent decision, has held that political committees' expenditures made to communicate their political ideas through sophisticated media advertisements are entitled to full First Amendment protection, and that the section of a federal statute making it a criminal offense for an independent "political committee" to expend more than $ 1,000 to further the election of a candidate receiving public financing violated the First Amendment. Even assuming that Congress could fairly conclude that large-scale political action committees have a sufficient tendency to corrupt, the Court held that the statute was a fatally overbroad response to that evil. In another case, involving a political n association formed to oppose a ballot measure which brought suit seeking injunctive relief against enforcement of an ordinance placing a limitation of $ 250 on contributions, the Supreme Court held that the ordinance contravened the First Amendment rights of association and expression.

A statute that requires candidates for state offices to file affidavits stating that they will comply with campaign spending limits or file daily disclosure reports and pay a surcharge violates the First Amendment. Such a statute restricts the quantity of political speech, it is not narrowly tailored to serve the state's asserted interest in reducing corruption, the idea of "leveling the playing field" between the rich and poor is not a compelling justification for interfering with politi-

cal speech, and the state's interest in keeping down the costs of running for office is not a compelling justification for interfering with political speech.

An unique state-conferred corporate structure which facilitates the amassing of large treasuries warrants a statute prohibiting the corporation from making independent expenditures on behalf of a candidate from its general treasury, where the statute is sufficiently narrowly tailored to achieve its goal, does not impose an absolute ban on all forms of corporate political spending, and permits corporations to make independent political expenditures from separate segregated funds.

553 Political patronage jobs

The practice of political patronage, especially patronage dismissals, has been held to violate the First and Fourteenth Amendments by placing severe restrictions on the freedoms of political belief and association, which can be justified only if it can be shown that the patronage dismissals further some vital government end by means that are the least restrictive of such freedoms in achieving such ends. In determining whether public employees may be discharged because of their political affiliation, the ultimate inquiry is not whether the label "policy maker" or "confidential" fits the particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Observation: Among indicia material to whether the particular responsibilities of an employee's position resemble those of an office holder whose function is such that party affiliation is an appropriate requirement for continued tenure, for purposes of a political discrimination challenge to termination, are relative pay, technical competence, the power to control others, the authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.

554 Running for political office

The right to run for public office touches on two fundamental freedoms, freedom of individual expression and freedom of association, and is protected by the First Amendment. However, it has been held that neither the First Amendment nor any other constitutional provision invalidates a federal statute which, in plain and understandable language, forbids federal employees to engage in such activities as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention.

The Supreme Court has held that a state statute requiring an independent candidate for the office of President of the United States to file a statement of candidacy and a nominating petition in March in order to appear on the general election ballot in November placed an unconstitutional burden on voting and associational rights and was thus invalid. However, a state law prohibiting an individual from appearing on the ballot as the candidate of more than one political party has been upheld as not violative of a political party's associational rights.

555 Prison inmates

The most obvious of the First Amendment rights that are necessarily curtailed by confinement in a penal institution are those associational rights that the First Amendment protects outside of prison walls; the concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution, and equally as obviously, the inmate's status as a prisoner and the operational realities of a prison dictate restrictions on the associational rights among inmates. First Amendment associational rights must give way to the reasonable considerations of penal management, and such rights may be curtailed whenever the penal institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment. Hence, state prison regulations which prohibit inmates from soliciting other inmates to join a prisoners' union, bar all meetings of such a union, and prohibit the delivery of packets of union publications that had been mailed in bulk to several inmates for redistribution among other prisoners, are drafted no more broadly than they need be to meet the perceived threat to order and security which stems directly from group meetings and group organizational activities of a prisoners' union; when weighed against First Amendment associational rights, these institutional reasons are sufficiently weighty to prevail.

556 Social clubs; private clubs; bars; dance halls

The First Amendment does not create a generalized right of social association. However, the Supreme Court has commented that private restricted social clubs are protected by the right to freedom of association, and that the right of association includes the right to be discriminatory in one's social associations, so long as the private discrimination is not supported by governmental action. Nonetheless, civil rights statutes operating to prohibit discrimination by private clubs

in membership on the basis of race, sex, or other personal characteristics have been upheld on the grounds that such statutes do not unduly infringe club members' associational rights in view of the compelling state interest in eradicating discrimination against women and racial minorities.

The Supreme Court has held that a city ordinance restricting admission to certain dance halls, otherwise open to the public, to persons between the ages of 14 and 18 did not infringe on the latter's First Amendment right of association. The Court ruled that the dance hall patrons were not engaged in any form of intimate or expressive association, and that there is no generalized right of "social association" that includes chance encounters in dance halls.

A bar owner does not possess First Amendment associational rights in his or her relationships with employees and patrons, where the bar is not a private club and can be patronized by any member of the public.

557 Student organizations and activities

The First Amendment rights of free speech and association extend to the campuses of state universities. It has been held that a school's nonrecognition of a student organization, such as a local chapter of Students for a Democratic Society (SDS) or a gay students' alliance or organization, as an official campus organization may not be based upon the school's disagreement with the organization's alleged philosophy, for such would constitute a violation of the student members' rights to freedom of association. However, recognition may be conditioned upon a student organization's agreeing to abide by reasonable campus regulations and to refrain from unlawful or disruptive actions.

So-called "parietal" regulations or policies of public or private colleges and universities, such as a requirement that students reside in dormitories or residence halls or a prohibition against visitation by persons of the opposite sex in residence hall or dormitory bedrooms, maintained by or under the control of the institution, have been sustained as against the assertion that they unconstitutionally violated the right of association of students. Although parents may have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and although the children may have an equal right to attend such institutions, the practice of excluding racial minorities from such institutions is not protected by the First Amendment.

558 Tenants

A village zoning ordinance prohibiting occupancy of one-family dwellings by more than two unrelated persons as a "family," while permitting occupancy by any number of persons related by blood, adoption, or marriage, has been held to involve no fundamental constitutional right guaranteed by the Constitution, such as the right of association.

559 Other associations

A portion of a state court injunctive order making it applicable to those acting "in concert" with named antiabortion protesters did not impermissibly limit the named antiabortion protesters' freedom of association guaranteed by the First Amendment, since such freedom of association does not extend to joining with others for the purpose of depriving third parties of their lawful rights.

In an action against a city for damages alleged to have arisen out of the operation of an airport owned by the city, discovery orders seeking the names and addresses of all persons who attended meetings with plaintiffs concerning the problem of alleviating or reducing noise generated from the operations of the airport were held not to be subject to the objection that they violated the constitutional right of freedom of association of the persons whose names were sought to be disclosed, although an opposite conclusion was reached in an action against a public agency with regard to a discovery order that compelled certain plaintiffs to disclose detailed information concerning both their own and others' affiliations with, and activities in, organizations which at various times protested operations at the airport and attempted to influence the future conduct of such operations, since the scope of the order went beyond any limited disclosure that defendant's legitimate litigation interests could justify and the "nondissident" nature of the private associations did not immunize the discovery order from First Amendment attack.

A court has held that a citizen has a right to be a nudist and to associate under the First Amendment with other nudists and that this alone cannot disqualify him or her from employment as a police officer.

The Supreme Court has held that, assuming that motel owners had standing to claim that an ordinance deeming motels permitting rental of rooms for less than 10 hours as sexually oriented businesses and imposing ordinance regulations on such motels on grounds that the ordinance violated their customers' constitutional right to freedom of association, such rights were limited to "traditional personal bonds" which have "played a critical role in the culture and traditions of the

Nation by cultivating and transmitting shared ideals and beliefs," and such an ordinance would not have any discernible effect on such rights.

A law which regulated commercial waste carting in part by refusing licenses to applicants who associated with criminals did not violate the right to intimate association, as it was limited to purely business associations.

560 Generally; source of rights

The theory upon which the political institutions and social structure of America rests is that all persons have certain rights of life, liberty, and the pursuit of happiness, which are inalienable, fundamental, and inherent. This principle was, of course, expressly stated in the Declaration of Independence. Personal liberty is a fundamental right. Its protection extends equally to children as well as to adults.

The Constitution of the United States is a charter of negative rather than positive liberties. It provides that neither Congress nor the states may deprive any person of life, liberty, or property without due process of law, and many of the state constitutions contain similar guarantees.

Observation: Where a state creates liberty interests broader than those protected directly by the Federal Constitution, those procedures mandated to protect federal substantive interests might fail to determine the actual procedural rights and duties of persons within that state.

For purposes of a substantive due process analysis under the Federal Constitution's Fifth and Fourteenth Amendments concerning the validity of an alleged impairment of a liberty interest, narrow tailoring is required only where fundamental rights are involved; the impairment of a lesser interest demands no more than a reasonable fit between the governmental purpose and the means chosen to advance that purpose.

A person's liberty has been held protected by the Due Process Clause, even when the liberty itself is a statutory creation of a state. And in the absence of special legislation, Indians, like other citizens, are embraced by the protection against an unwarranted intrusion on personal liberty.

The test to measure the validity of a state statute under the Due Process Clause of the Fourteenth Amendment has been held to be whether the statute is contrary to the fundamental principles of liberty and justice, and the application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests. The Due Process Clause of the Fourteenth Amendment affords not only a procedural guarantee against the deprivation of "liberty," but also protection of the substantive aspects of liberty against unconstitutional restriction by the state.

561 Construction and definition of terms

The words "life, liberty, and property" as used in constitutions are representative terms and are intended to cover every right to which a member of the body politic is entitled under the law -- in short, all that makes life worth living, or all the rights consistent with public safety. The liberty thus guaranteed is a very broad and extensive concept. Judicial interpretation has given to this word, as so used, its most comprehensive signification; it has been said to embrace every form and phase of individual right that is not necessarily taken away by some valid law for the common good. The guarantee of due process protects the liberty of the individual. The cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest is that a government should be one of laws, and that all persons are equal before the law. And although the liberty protected by the Fourteenth Amendment consists mainly of the vital rights of a citizen as asserted at common law when the Constitution was adopted, it is settled that the "liberty" safeguarded by the Due Process Clause includes protection from violation for any of the fundamental conceptions of justice which lie at the base of our civil and political institutions. This concept of liberty contained in the Fourteenth Amendment is constantly enveloping the protection of more and more fundamental rights. As stated by the Supreme Court at various times, it has not attempted to define with exactness the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. There exists a variety of interests which are difficult of definition, but are nevertheless comprehended within the meaning of "liberty," as the term is used in the due process clauses. "Liberty" the Supreme Court has said, "is a 'broad and majestic' term, purposely left to gather meaning from experience." To determine whether a restriction on liberty constitutes an impermissible punishment or permissible regulation, the Supreme Court first looks to legislative intent.

The "pursuit of happiness" has been interpreted as the right to follow or pursue any occupation or profession without restriction and without having any burden imposed upon one that is not imposed upon others in a similar situation.

"Pursuit of happiness" also encompasses freedom of contract. However, the Federal Constitution and its amendments do not guarantee a generalized right to the pursuit of happiness.

562 Elements, generally

The elements of the term "liberty," as used in the due process clauses, have been summarized by the courts in varying language. Thus, liberty consists partially of the right to be free from arbitrary personal restraints or servitude. In this sense it consists largely of freedom from arbitrary physical restraint. Among the historic liberties protected by the due process clauses of the Fifth and Fourteenth Amendments is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. Under the Fourteenth Amendment's protection of liberty interests, it is fundamental that a state cannot hold and physically punish an individual except in accordance with due process of law. However, it is well settled that the "liberty" protected by the due process clauses does not merely denote an individual's freedom from physical or bodily restraint. It includes liberty of the mind as well as liberty of action. The liberty mentioned in the Due Process Clause of the Fourteenth Amendment has been held to mean also the right of the citizen: to be free in the enjoyment of all his or her faculties; to be free to use them in all lawful ways; to live and work where he or she will; to earn his or her livelihood by any lawful calling; and to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his or her carrying out to a successful conclusion the purposes above mentioned. Similarly, "liberty," as guaranteed in the Due Process Clause of the Fifth and Fourteenth Amendments, has been held to denote the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his or her own conscience, and generally to enjoy those privileges long recognized at common law as being essential to the orderly pursuit of happiness by free people. In short, liberty under law extends to the full range of conduct which the individual is free to pursue, and which cannot be restricted except for a proper governmental objective. The right to a fair trial in a criminal case has been held to be a fundamental liberty secured by the Fourteenth Amendment. On the other hand, the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment has been held not to include among its incidents a vested right of an individual to have the rules of law remain unchanged for his or her benefit.

563 Limitations

An individual's strong interest in liberty may, in circumstances in which the government's interest is sufficiently weighty, be subordinated to the greater needs of society. Thus, in spite of the broad scope of the fundamental right of liberty and the jealous protection by the Constitution of the rights of the individual, liberty is not a right which is uncontrollable, or which is absolute under all circumstances and conditions. It is liberty in a social organization, and when one becomes a member of society, he or she necessarily parts with some privileges which, as an individual not affected by his or her relations to others, he or she might retain. [n36]

Every person has a fundamental right to liberty in the sense that the government may not punish him or her unless and until it proves his or her guilt beyond a reasonable doubt at a criminal trial conducted in accordance with relevant constitutional guarantees; however, a person who has been so convicted is eligible for, and a court may impose, whatever punishment is authorized by statute for his or her offense, so long as that penalty is not cruel and unusual and so long as the penalty is not based on some arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. Thus, despite the fundamental nature of the right to travel, for instance, there are situations in which a state may prevent a citizen from leaving, such as when a person has been convicted of a crime within the state, he or she may be detained within that state, and returned to it if he or she is found in another state. Or the state may force an individual who has been extradited to leave the state. A mentally retarded person does not have a constitutional guarantee of a right to live in the community of his or her choice or in the least restrictive environment. And the imposition and affirmance of a defendant's death sentence for capital murder has been held not to violate the right to life proclaimed in a state constitution, since the provision in question does not prohibit the state from establishing that certain criminal acts are so heinous as to warrant forfeiture of a convicted defendant's life. It has been said that society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy, and that the liberty of one individual must necessarily be subject to the same right in all others. Hence, liberty does not signify unrestrained license to follow the dictates of an unbridled will. Individuals may be deprived of life or liberty as punishment for crime or because their mental state makes them dangerous to society. And one who is prevented from injuring another cannot justly assert that he or she has himself been deprived of any right. Liberty implies the absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

Observation: The state does not have a constitutional duty to protect its citizens from private violence. and there is no positive entitlement to fire protection. However, while there is also no general constitutional right to police protection, the police may not discriminate in providing such protection.

Although, as indicated above, liberty is subject to governmental regulation, it must be clearly understood that where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling; the liberty protected by the due process clauses cannot be restricted except for a proper governmental purpose. The liberty protected by the Due Process Clause of the Fourteenth Amendment may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Moreover, the Supreme Court has ruled that even though a governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The Supreme Court has also held that under the Fourteenth Amendment, a state, even when pursuing a legitimate interest, may not choose means that unnecessarily restrict constitutionally protected liberty; the breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. This rule has been particularly applied in cases in which the liberties guaranteed by the First Amendment were in issue.

564 Applicability of liberty concept to artificial persons

Although a corporation is, generally speaking, a person within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments, it is equally well settled that the liberty guaranteed against deprivation without due process of law is a liberty of natural, and not artificial, persons. Under this rule, the Supreme Court has recognized that corporations cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. However, it appears as a matter of fact from many of the cases that this rule has not been applied by the court to issues concerning liberty of contract, apparently because this liberty is ordinarily exercised by an artificial person in the use and management of its property.

565 Generally; physical restraint

Physical restraint of an individual obviously deprives him or her of liberty. The only question in this situation is whether such restraint violates due process of law. A mandatory sentence provision for sexual crimes against infants does not involve an unconstitutional deprivation of a defendant's fundamental right to liberty. To determine whether the rights to liberty, privacy, and free movement have been violated, courts must balance those rights against society's right to protect itself; in carrying out this balancing, courts look to the reasonableness of the intrusion and permit brief investigatory stops based upon reasonable suspicion of criminal activity. Whether the confinement of a mentally ill person deprives him or her of liberty without due process depends upon the circumstances presented in each case. Under some circumstances, the state may have a constitutional duty to care for those whom it has physically restrained, but that duty arises only when the state, by the affirmative exercise of its power, so restrains an individual's liberty that it renders him or her unable to care for himself or herself, and at the same time fails to provide for his or her basic human needs. It is the state's affirmative act of restraining the individual's freedom to act on his or her own behalf, not the individual's own limitations, that gives rise to this constitutional duty to protect. Even when the state has a duty to provide substantive services for persons in its custody, it necessarily has considerable discretion in determining the nature and scope of its responsibilities; however, in any case, the state must satisfy the custodial individual's basic needs and constitutionally protected liberty interests.

566 First Amendment rights

The First Amendment freedoms of speech and press, religion, and association are within the term "liberty" as protected by the Due Process Clause of the Fourteenth Amendment against invasion by the states.

567 Right of privacy

The right of privacy has been found to be implicit in the concept of liberty guaranteed by ß 1 of the Fourteenth Amendment. Procreation, together with marriage and marital privacy, are fundamental civil rights protected by the due process and equal protection clauses of the Fourteenth Amendment.

Observation: Although the right to be let alone protects adults from government intrusion into matters relating to marriage, contraception, and abortion, the state may exercise control over the sexual conduct of children beyond the scope of its authority to control adults. The principles that embody the essence of constitutional liberty and security forbid all invasions, on the part of the government and its employees, of the sanctity of a person's home and the privacy of his or her life. Similarly, the security of one's privacy against arbitrary intrusion by the police has been held to be implicit in the concept of ordered liberty and, as such, enforceable against the states through the Due Process Clause of the Fourteenth Amendment. However, the fact that a father, on the advice of counsel, accepted the terms of a divorce decree requiring him to undergo psychological testing and treatment did not constitute an interference with his privacy interests.

568 Liberty of contract

Freedom to contract is a part of the liberty protected by the due process clauses of the Fifth and Fourteenth Amendments. However, like other rights, freedom of contract is subject to both exceptions and limitations.

569 Right to pursue business or occupation

The word "liberty," as used in the due process clauses, includes among other things the liberty of the citizen to pursue any livelihood or lawful vocation. Indeed, the right to earn a livelihood pursuing a lawful occupation is a fundamental right protected by the Constitution, and many authorities consider the preservation of such right to be one of the inherent or inalienable rights protected by the Constitution. Likewise, the courts have recognized that the right to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" (and "property") concept of the Fifth Amendment.

Manifestly, however, the right to engage in an occupation, as is true of all rights, is subject to the police power of the government.

570 Matters of employment

The right to work for a living in the common occupations of the community has been held to be of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure; and an employee has a due process right to be free from unreasonable, governmental interference with private employment. The opportunity to pursue employment is also a "fundamental right" under many state constitutions, since it is a necessary incident to specifically enumerated fundamental rights to pursue life's basic necessities, it being primarily through work and employment that one exercises and enjoys the right to pursue life's basic necessities.

The Supreme Court has also recognized that the right to hold specific private employment free from unreasonable governmental interference comes within the "liberty" (and "property") concept of the Fifth Amendment. On the other hand, as also has been held by the Supreme Court, it would stretch the concept of procedural due process too far to suggest that a person is deprived of "liberty" when he or she simply is not retained in one job, but remains as free as before to seek another. The due process liberty interest also applies in situations involving the obtaining, rather than the retaining, of federal employment.

There is no fundamental constitutional right to work for, or to have continued employment with, a particular public or private employer. Thus, one employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction, to the end that proper discipline may be maintained and that employee's activities may not be allowed to disrupt or impair the public service. However, the right to public employment is protected by the Due Process Clause against an arbitrary determination of loyalty as a condition of eligibility for such employment.

Observation: Discharge of an employee for failing to disclose to his employer his pending discrimination litigation against a client did not violate the employee's constitutional rights to pursue his discrimination claim or to pursue and maintain employment; the employer had a legitimate expectation to be informed of such a conflict of interest.

571 Matters of education and public schools

As stated by the Supreme Court, the term "liberty," as used in the due process clauses, embraces the right to acquire useful knowledge. Nonetheless, the Court has ruled that although a public education is not merely some governmental benefit indistinguishable from other forms of social welfare legislation, it is not a "right" granted to an individual by the Federal Constitution. Some state constitutions have been interpreted as providing for a fundamental right to an education, while other state constitutions are said not to provide such a fundamental right. There also is no constitutionally protected right to be taught by the teachers of one's own choice, and there is no federal constitutional right to have local school boards make educational decisions. There is no constitutional right to play sports or engage in other school activities, and parents have no clearly established right to have their children compete in interscholastic athletics. However, the right to educate one's children as one chooses and the right to study foreign languages in a private school is made applicable to the states by the force of the First and Fourteenth Amendments. And a state statute requiring all children between the ages of eight and 16 years to attend the public schools was held to unconstitutionally interfere with the Fourteenth Amendment right of the liberty of parents and guardians to direct the upbringing and education of children under their control. Also, the due process clause, in its procedural aspects, has been held to protect students against expulsion from the public school system without notice or hearing, either before or after such expulsion.

Where the "minimum standards" promulgated by the state board of education are so comprehensive in scope and effect as to eradicate the distinction between public and nonpublic education, application of these "minimum standards" to defendants, parents of children attending a nonpublic religious school, abrogates their fundamental freedom, protected

by the liberty clause of the Fourteenth Amendment, to direct the upbringing and education, secular or religious, of their children. Also, no state-created interest in liberty going beyond the Fourteenth Amendment's protection of freedom from bodily restraint and corporal punishment is involved with regard to corporal punishment of a public school student. The state may not compel any person to recite the Pledge of Allegiance to the United States flag. And a statute prohibiting the organization of fraternities, sororities, and other secret organizations in public schools has been held not to deprive pupils of their inalienable right to life, liberty, and the pursuit of happiness.

572 Personal appearance and grooming

The right of an individual to control his or her personal appearance, including his or her grooming and hairstyle, is sufficiently substantial to be accorded the protection of the liberty assurance of the Due Process Clause of the Fourteenth Amendment. The Supreme Court has assumed without deciding that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance." However, this right is not absolute, and it is necessary for a court to assess the weight to be given to legitimate and opposed interests of society that occasion legislation and rules affecting the personal appearance of the individual.

573 Particular situations

An individual's right to control his or her personal appearance, including his or her grooming and hairstyle, has been judicially protected in a variety of specific situations. However, any constitutional right a person may have to wear long hair and a beard may be limited during lawful incarceration after conviction, and rules requiring short hair and a clean-shaven face are neither arbitrary nor unreasonable as regards convicted prisoners, since the individual's right to "aspects of his or her appearance" is outweighed by the state's interest in maintaining sanitary conditions and discipline in prison facilities.

A regulation establishing hair-grooming standards for male members of a county police force was held by the Supreme Court not to violate a county policeman's liberty right under the Due Process Clause of the Fourteenth Amendment, but a federal court has voided the dismissal of a school bus driver for having grown a mustache. There has also been a substantial amount of litigation concerning appearance or grooming regulations or requirements as applied to school children and the question whether such regulations by employers violate the civil rights of employees. And the question has been raised as to whether an employee's refusal to shave off a beard or trim his or her hair constitutes misconduct barring unemployment compensation benefits.

574 Interest in reputation

While there is some authority, at least in the state courts, that the right to pursue and obtain happiness includes by its very nature the right to live free from unwarranted attacks by others on one's liberty, property, or reputation, and that any person living a life of rectitude has that right of happiness which includes freedom from unnecessary attacks on his or her character, social standing, or reputation, the United States Supreme Court has held that a person's interest in his or her reputation alone, apart from some more tangible interest such as employment, is not a "liberty" by itself sufficient to invoke the procedural protection of the due process clauses of the Fifth and Fourteenth Amendments. On the other hand, in connection with other constitutional rights, an interest in reputation has been considered by the Supreme Court as a factor in determining whether due process "liberty" was violated. For instance, an allegedly tenured pharmacist states a cause of action for deprivation of a liberty interest protected by the Fourteenth Amendment where he or she combines his or her defamation claim with a claim of wrongful discharge, inasmuch as the termination coupled with the defamatory statements implicates a liberty interest when: (1) the individual's good name, reputation, honor, or integrity are at stake by charges such as immorality, dishonesty, alcoholism, disloyalty, communism, or subversive acts, or (2) the state imposes a stigma or other disability which forecloses opportunities for the individual.

Practice guide: A discharged public employee's claim that the government has deprived him or her of a constitutionally protected liberty interest in his or her reputation must meet two requirements: (1) the employee must demonstrate that the government's defamation resulted in harm to some interest beyond his or her reputation, which requirement is satisfied by proof of loss of present or future government employment; and (2) the plaintiff must also allege that the government has actually stigmatized his or her reputation (for example, by charging the employee with dishonesty) and that this stigma has hampered his or her future employment prospects.

575 Matrimonial or family matters; in general

The freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights, and such relationships may take various forms, including the most intimate; the First Amendment protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. Thus, freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clauses; there does exist a private realm

of family life which the state cannot enter. Thus, in invalidating a state antimiscegenation statute, the Supreme Court observed that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free people. And, in holding that the Due Process Clause of the Fourteenth Amendment was violated by a state school board's overly restrictive rules involving mandatory maternity leave for teachers, the Court based its decision on the principle that there is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. The Supreme Court has also held unconstitutional a city housing ordinance limiting occupancy of a dwelling unit to members of a single family, which was interpreted to prohibit a grandmother from residing with her son and grandchildren, the court viewing the ordinance as violative of the freedom of personal choice in matters of family life, without justification in any important governmental interest. Although the right of a family to determine its own living arrangements has never been accorded the status of a fundamental right, it is nonetheless recognized as constitutionally protected. And a state statute making it a criminal offense for married couples to use contraceptives deprived married couples of "liberty" without due process of law. However, an immigration statute, imposing a two-year nonresidency requirement for aliens who marry United States citizens while subject to deportation proceedings, does not violate the fundamental right of marriage or of residence of United States citizen-spouses.

Although the Supreme Court acknowledges that the relationship between a parent and child is constitutionally protected, it has held that a state could apply its "best interests of the child" standard and grant an adoption without the consent of the father, who was not married to the mother, even though the state's statutes gave both divorced parents a right to veto an adoption. Furthermore, the fact that a father, on the advice of counsel, accepts the terms of a divorce decree requiring him to undergo psychological testing and treatment does not constitute an interference with his liberty interests.

576 Right to travel

The constitutional freedom to travel includes the freedom to enter and abide in any state in the Union. However, the means or mode of traveling may be subjected to reasonable regulations. While the freedom to travel within the United States has been held to be a basic right under the Federal Constitution which is independent of a specific provision therein, the right of locomotion has also been held to be a part of the "liberty" guaranteed by the due process clauses. The right to migrate protects residents of one state from being disadvantaged or from being treated differently, simply because of the timing of their migration, from other similarly situated residents. Laws which burden the right to migrate must be necessary to further a compelling state interest. In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel when applied to residency requirements protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. Thus, the Supreme Court has stated that the liberty secured by the Due Process Clause of the Fourteenth Amendment consists, in part, in the right of a person to live and work where he or she will.

State law implicates the constitutional right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which it serves to penalize exercise of that right.

The Supreme Court has accepted as constitutional the federal statute authorizing the incarceration of material witnesses in advance of trial. Similarly, the Uniform Act to Secure Attendance of Out-of-State Witnesses has been held not to violate the Fourteenth Amendment by unduly restricting a citizen's right to ingress and egress. And a bona fide residence requirement of a Texas statute, which was appropriately defined and uniformly applied with respect to attendance in free public schools, did not violate the equal protection clause of the Fourteenth Amendment, and does not burden or penalize the constitutional right of interstate travel. But New York's restriction of its civil service preference to veterans who entered the armed forces while residing in New York violated the constitutionally protected right to travel.

Practice guide: The "strict scrutiny" standard of constitutional review applies where the violated interest is a fundamental personal right or civil liberty, such as the right to interstate travel.

The Supreme Court has stated that the right to travel abroad is a part of the "liberty" of which a citizen cannot be deprived without due process of law. However, the constitutional liberty to travel abroad is subject to limitations. Thus, freedom to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations, and is, as such, subject to reasonable governmental regulation, inasmuch as the freedom to travel outside the United States is distinguishable from the right to travel within the United States.

577 Rights in public vehicles and places

Under the constitutional guarantee of liberty one may, under normal conditions, move at his or her own inclination along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, one will be protected, not only in his or her person, but in his or her safe conduct. For example, the right of a citizen to drive on a public street with freedom from police interference, unless he or she is engaged in suspicious conduct associated in some manner with criminality, is a fundamental constitutional right. However, the liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others.

Statutes or ordinances regulating loitering, arrests for vagrancy, breach of the peace, or disorderly conduct in public places, challenged on due process grounds, have been sustained in some cases and invalidated in others, depending upon the language and scope of the provisions. A person is free to live on the street, if that person chooses to do so; a person may not be held against her will merely to improve her standard of living or because society may find it uncomfortable to see such people on the street. Curfew ordinances affecting juveniles and children have been held constitutional in some cases, although there is much authority to the contrary, and there is an increasing tendency to hold them unconstitutional.

578 Health matters and regulations; in general

Reasonable governmental health regulations, such as a compulsory vaccination law to protect the population against the danger of smallpox, or the fluoridation of the public water supply, have been held not to violate personal due process liberty. Assuming that the Constitution recognizes a liberty interest in avoiding unwanted administration of antipsychotic drugs, the substantive issue involves definition of that protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. There is no constitutionally protected right to indulge in the use of euphoric drugs.

A state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or herself or with the help of willing and responsible family members or friends.

579 Rights of prisoners and parolees

Prisoners generally have a "liberty" interest requiring a determination whether action taken by prison authorities violates due process. Thus, ruling that federal courts may consider the validity of procedures for depriving state prisoners of good-time credits, the Supreme Court has held that: (1) the state having created the right to good-time credits and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoners' interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle them to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to ensure that the state-created right is not arbitrarily abrogated; and (2) a person's liberty is equally protected by the Due Process Clause even when the liberty itself is a statutory creation of the state. On the other hand, the transfer of a prisoner from one state institution to another institution in the state does not infringe or implicate a liberty interest within the meaning of the Due Process Clause of the Fourteenth Amendment, inasmuch as the prisoner's conviction of a crime has sufficiently extinguished his liberty interes to permit the state to confine him in any of its prisons, even though life in one prison is more disagreeable than in another, so long as the conditions of the confinement do not otherwise violate the Constitution. A prison inmate has no Fourteenth Amendment liberty interest in prison employment.

A pretrial detainee's desire to be free from discomfort does not rise to the level of a fundamental liberty interest under the Due Process Clause of the Fifth Amendment. In evaluating the constitutionality of conditions or restrictions of pretrial confinement that implicate only the protection against deprivation of liberty without due process of law, the proper inquiry is whether those conditions amount to punishment of the detainee.

The mere existence of a parole system does not create a liberty interest in being released on parole. However, particular statutes establishing criteria for release of prisoners on parole have been held to create such liberty interests. The liberty interest of a parolee is protected by the Due Process Clause of the Fourteenth Amendment.

580 Miscellaneous matters

The question whether constitutionally guaranteed "liberty" has been invaded by government action has been presented in a miscellany of situations in addition to those discussed in preceding sections. When an alien is ordered deported, the liberty of that individual is at stake and he or she accordingly is entitled to procedural due process.

A state criminal statute prohibiting the use of the flag of the United States for purposes of mere advertisement was held not to infringe any right of personal liberty as guaranteed in the Due Process Clause of the Fourteenth Amendment. However, the state may not compel any person to recite the Pledge of Allegiance to the flag or display the state's slogan.

The retroactive application of a state workers' compensation statute does not deprive employees of liberty without due process.

A motel owner-operator is not deprived of liberty (or property) under the Fifth Amendment, by the loss of its "right" to select its guests free from governmental regulation, by the provisions of the Civil Rights Act of 1964, which forbids discrimination or segregation on the ground of race, color, religion, or national origin in various places of accommodation affecting commerce.

581 Generally

The right to use and enjoy, and to acquire and sell, one's property is a fundamental right protected by state and federal constitutions. However, the United States Constitution does not itself create property rights. The Federal Constitution, designed as a charter of negative liberties, generally does not impose any affirmative duty on the federal or state governments to provide services or procedural protections to rights in property. But the Fifth Amendment to the Constitution does prevent the Federal Government or its agencies from depriving any person of his or her property without due process of law; and the Fourteenth Amendment, and all the various state constitutions, prevent any action by a state which would accomplish such deprivation.

Practice guide: The due process guarantee as it relates to property rights raises two questions: first, what is property, and second, what is a deprivation. Although as an abstract matter these questions seem distinct, in the cases it is very difficult to determine whether a decision turned upon the "property" question, or upon the "taking" question. In general, however, what is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all the circumstances which may render the proceeding appropriate to the nature of the case.

The nature of the particular case must also be considered: if there has been such an exercise of power as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the classes to which the one in question belongs, it is due process.

The inhibition against taking property without just compensation has been deemed applicable in contexts other than the field of eminent domain.

There is an important distinction between liberty and property with respect to the protection included in the Fourteenth Amendment, as far as the persons who may invoke the constitutional guarantees of due process are concerned; for although corporations cannot invoke the "liberty" concept for their own protection, since they are not natural persons, they are fully entitled to the protection of the Due Process Clause in their property or their property rights.

582 Nature of rights guaranteed

"Property" in the constitutional sense means not tangible property itself, but rather the right to possess, use, enjoy, and dispose of property. Individuals have a right to own and enjoy private property; and property owners have a right under the Federal Constitution not to have the government physically occupy their property without due process of law or without just compensation.

Observation: A state constitutional provision which guarantees the right to acquire and possess property does not impose upon the state government any affirmative obligation to finance housing for homeless persons, or to provide them with emergency shelter assistance.

The right of property has been described as a fundamental, natural, inherent, and inalienable right. It existed before the constitutions which protect it, and dates back to the Magna Carta. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. Indeed, it is said that the right of property lies at the foundation of our constitutional government and is necessary to the existence of civil liberty and free institutions, and it has been said that there is no greater safeguard to the perpetuity of our republic and traditions and institutions than the responsibility of property ownership. The constitutional prohibition against the deprivation of property without due process of law reflects the high value, embedded in constitutional and political history, that is placed on a person's right to enjoy what is his or her, free of any unreasonable governmental interference.

Practice guide: While property ownership is clearly one factor to be considered in determining whether an individual's rights have been violated, property rights are neither the beginning nor the end of the inquiry. Other factors to be weighed include: whether a defendant has possessory interest in the things seized or the place searched; whether the defendant has a right to exclude others from that place; whether the defendant has exhibited subjective expectations that the place would remain free from governmental invasion; whether the defendant took normal precautions to maintain his or her privacy; and whether the defendant was legitimately on the premises.

Due process is not denied by a statute which secures complete protection of property rights only so long as the property rights require the protection, or continue to exist.

583 Limitations; in general

A property owner generally has the constitutional right to make any use of his or her property he or she desires, so long as the owner does not endanger or threaten the health and safety of the general public. However, at least in some jurisdictions, the right to use lawfully regulated property as one wishes is not deemed a fundamental right. The right to freely alienate real property has also been termed not a "fundamental right" that calls for the application of strict scrutiny. While the constitutional guarantees with reference to the enjoyment of property should remain stable, it is equally true that they are not so rigid that they should not, within the realm of reasonableness, bend to accommodate the public welfare, the well-being of the whole people.

Property rights are subject to reasonable regulation to promote the general welfare. Furthermore, if Congress or a state legislature creates a property right, they perforce have broad powers to limit that right; anyone accepting the property would of necessity take subject to those limitations.

One has no constitutional right to possess and enjoy property in a wrongful manner, as by refusing to apply it to the payment of his or her adjudicated indebtedness. And the constitutional protection afforded property rights does not extend to property used in violation of criminal laws.

584 Government regulation of property use

The constitutionally protected right of a property owner to do as he or she sees fit with his or her own property is not absolute, but is subject to such reasonable restraints and regulations established by law as the legislature, under governing and controlling power vested in it by the constitution, may think necessary and expedient. There is, for instance, no general constitutional right to be free from all changes in land use laws, and there is no constitutionally protected right to the most profitable or the most desirable use of real property. The rights attendant with ownership of property do not include the right to be free from all government interference with the uses to which an owner puts his or her property or condition in which he or she maintains it, and thus requiring compliance with state and local building codes and injunctions does not deprive a property owner of any property rights.

Aside from specific constitutional limitations, private property is subject to the limitations expressed in the maxim "sic utere tuo ut non alienum laedas," and to three rights of government: (1) the right of eminent domain; (2) the right of taxation; and (3) the right to exercise the police power.

585 What is property, generally

The word "property" in the Fourteenth Amendment embraces all valuable interests which a person may possess outside of himself -- outside of life and liberty. It is more than the mere thing which a person owns; it includes the right to acquire, use, and dispose of it, and the Constitution protects these essential attributes. The right of property has been also defined as the right to acquire, possess, and enjoy particular things and objects in any way consistent with the equal rights of others and the just exactions and demands of the state.

In applying the Due Process Clause, different kinds of property are not distinguished. Property interests subject to procedural due process protection are not limited by a few rigid, technical forms; rather, "property" denotes a broad range of interests that are secured by existing rules or understandings. In order to constitute a property right for purposes of due process, one must have a current valid expectation, based on the government's implied promise to continue this entitlement, in an important, personal, monetizable interest.

Observation: The definition of property may turn on a question of state law, but if the property interest is found to exist, the question of what process is due is a matter of federal law. However, the Due Process Clause does not create property interests and to determine whether an individual has such interests, existing rules or understandings that stem from independent sources, such as state law, must be examined.

586 Types of property

The types of property rights which are protected by the guarantee of due process are varied, and may take many forms. The guarantee refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto. It relates not only to those tangible things of which one may be the owner, but to everything which he or she may have of an exchangeable value. The Fourteenth Amendment's protection of "property" does not safeguard only the rights of undisputed ownership, but also extends protection to any significant property interest, including statutory entitlements. No question arises over the more common forms of real and personal property. But the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money, and it is when the question arises with respect to the less tangible forms of property that an inquiry as to what is property must be made.

To constitute a violation of the provision against depriving any person of his or her property without due process of law, it should appear that such person has a property in the particular thing of which he or she is alleged to have been deprived. It is only a vested right which cannot be taken away except by due process of law. A mere subjective "expectancy" is not an interest in property protected by procedural due process. To have a property interest in a benefit protected by procedural due process, a person must have more than an abstract need or desire for it, and he or she must have more than a unilateral expectation of it; in short, he or she must have a legitimate claim of entitlement to it.

Observation: Just as a state may create a property interest that is entitled to constitutional protection, the state has power to condition a permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain interest.

It has been held (although there is also some authority to the contrary) that a public office is not property within the meaning of the federal constitutional provision against deprivation of property without due process of law, although a public employee may possess due process rights which must be respected before his or her employment may be terminated. However, reputation alone, apart from some more tangible interests such as employment, is not "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. And there are certain things which a person may own, but in which there are no property rights recognized by the Constitution. The constitutional protection of property rights is not to be unduly extended to tenuous interests that may vanish even without legal interference.

Certain privileges as to which a qualified right of property may be recognized are inherently subject to legislative regulation and no such vested right in them exists as will prevent the legislature from withdrawing such privileges from those who previously enjoyed them. Licenses and permits are generally not considered property in any constitutional sense. Accordingly, the revocation of such qualified rights does not amount to a deprivation of property without due process of law. The separate character of property acquired during marriage by gift, devise, or descent is constitutional in nature, however. Generalized environmental concerns do not constitute property or liberty interests requiring the protection of the Due Process Clause. However, statutory entitlement to receipt of an educational assistance allowance under a federal statute does constitute a "property right" protected by the Due Process Clause. The right of a creditor to collect a garnishment is "a significant property interest" protected by the Due Process Clause of the Fourteenth Amendment. And the right to practice law is a valuable property right which can be denied only by due process of law.

587 Rights in relation to property

An owner cannot be deprived of any of the essential attributes which belong to the right of property. Included within the right of property which is constitutionally protected are the rights to acquire, hold, enjoy, possess, manage, insure, defend and protect, and improve property, and the right to devote property to any legitimate use. Indeed, the substantial value of property lies in its use; if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right. The constitutional right to acquire, possess, and protect property is not limited to any particular amount of property.

A very important incident of the right of property is the right to dispose of it. Thus, the right to buy, sell, barter, and exchange property is a necessary incident to its ownership and, subject to reasonable regulation, is as much protected by the constitution as is the ownership itself; similarly protected is the right to enter into contracts in relation to property. The right to fix the price at which property shall be sold is also, under ordinary circumstances, an attribute of the property. However, the right to will or inherit property has usually been held not be a constitutionally protected property right.

588 What is a deprivation

Both federal and state constitutions preclude the government from asserting summary authority over the property of persons, and any deprivation of property must be accomplished in accordance with due process of law. Although the United States Constitution does not contain any definition of the word "deprive" as used in the Fourteenth Amendment,

because the constitutionally protected right of property is not unlimited, it follows as a matter of fundamental logic that not every regulation of the right, and not every act affecting the right, amounts to a deprivation. The determination whether there has been a deprivation of property, for purposes of constitutional guarantees protecting against deprivation, is frequently difficult. Burdens and expenses may within reasonable and constitutional limits be imposed on property, and emergency invasions or limitations of the use of property have been sustained. However, the concept of "confiscation" of private property is at odds with the Due Process Clause of the Fifth Amendment. Property rights are unwarrantedly infringed by requiring them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communications exist, because such accommodation diminishes property rights without significantly enhancing the asserted right of free speech. Thus, a law is considered as being a deprivation of property within the meaning of this constitutional guarantee if it deprives an owner of one of its essential attributes, destroys or impairs its value, restricts or interrupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. The imposition of unreasonable conditions upon the use of property is an unconstitutional deprivation because it deprives the owner of his or her property, even without any actual taking. In short, any significant taking of property by the state is within the purview of the Due Process Clause of the Fourteenth Amendment; as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.

The duration of any potentially wrongful deprivation of a property interest under a state's procedures is an important factor in assessing the impact of official action on the private interest involved for purposes of determining the process due under the Due Process Clause of the Fourteenth Amendment, but it is not decisive of the basic right to a prior hearing of some kind. A temporary, nonfinal deprivation of property is a "deprivation" in the terms of the Fourteenth Amendment.

Observation: Clearly, one cannot be deprived of property which he or she does not own.

589 Generally

The state or federal government, under the police power, may order the destruction of private property, in a proper case. A reasonable regulation under the police power is not a violation of the due process guarantee, even though property in whole or in part is taken or destroyed, without compensation. In cases of great emergency engendering overwhelming necessity, property may thus be taken or destroyed without compensation and without what is commonly called "due process of law." But public necessity is the limit of the right to destroy property which is a menace to public safety or health, and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. Similarly, the right of the community to destroy private property can as a rule be exercised only in case of extreme, imperative, or overruling necessity; and the justification of destruction of private property under plea of necessity is always a question of fact to be tried by a jury and settled by its verdict, unless the sovereign authority has constitutionally provided some other mode. Property rights cannot be wrongfully destroyed by arbitrary action in the exercise of the police power.

Observation: Where a business is extinguished as noxious under the Constitution, the owners cannot demand compensation from the government.

590 Notice and hearing

Where necessary to ensure the public safety, the legislature may under its police power authorize municipal authorities summarily to seize and destroy property without legal process or previous notice to the owner. So far as property is dangerous to the safety or health of the community, due process of law may authorize its summary seizure and destruction. But in any case in which the property may have a lawful use or in which a fair question arises as to whether the property is such as should be seized or destroyed, a notice and hearing are necessary. As otherwise stated, property which is inoffensive and harmless can be condemned or destroyed only by legal proceedings with due notice to the owner. [n28]

591 Destruction or seizure of property used illegally

Private property enjoys no constitutional privilege when it is knowingly used to defy a state's criminal laws. With respect to the necessity of affording a notice or hearing before destroying or seizing property used for an unlawful purpose, a distinction has been drawn between property which may be innocently used and that which is incapable of any except an illegal use. While in the exercise of the police power the legislature has authority to declare property which may be used only for an unlawful purpose to be a public nuisance and authorize it to be abated summarily, if property which is innocent in its ordinary and proper use has been used for an unlawful purpose, it is beyond the power of the legislature to order its summary forfeiture to the state as a penalty or punishment for such unlawful use without giving its owner an opportunity for a hearing.

There is no constitutional objection to enforcing a penalty by forfeiture of the offending article. Statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States do not constitute a violation of the Due Process Clause of the Fifth Amendment.

Some articles may be incapable of any lawful use and the legislature may make the mere possession of them illegal. In this class fall burglars' tools, counterfeiting outfits, obscene pictures or prints, gaming tables, and slot machines. Statutes may authorize their seizure and forfeiture without in any way violating constitutional provisions prohibiting the deprivation of property without due process of law. But the taking and destruction by government authorities of firearms and firearm parts, unrelated to any violation of law and which concerned property validly in the plaintiff's possession, has been held to be a violation of the Due Process Clause. And the right to maintain control over one's home, and to be free from governmental interference, is a private interest of historic and continuing importance for purposes of an analysis to determine whether a civil forfeiture of a home, seized because of drug charges filed against its owner, must be preceded by notice and an opportunity for a hearing.

592 Generally

The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution; such protection is particularly found in the guarantees of the Fourteenth Amendment. The right is fundamental, natural, inherent, and inalienable, and is one of the most sacred and most valuable rights of a citizen.

A person's business, occupation, or calling is "property" within the meaning of the constitutional provisions as to due process of law, and the constitutional guarantee of the right of property protects it not only from confiscation by legislative edicts, but also from any unjustifiable impairment or abridgment. Individual businesses, occupations, or callings are also included in the right to liberty and the pursuit of happiness. The right of a person to pursue a calling, consistent with proper and reasonable police regulations which the particular situation may sanction, cannot be taken away by legislative enactment. The common businesses and callings of life, the ordinary trades and pursuits which are innocent in themselves and which have been followed in all communities from time immemorial, must therefore be free in the United States to all alike upon the same terms. Any person is at liberty to pursue any lawful calling, although he or she may not be allowed to practice it in any place he or she sees fit.

The right of an individual to engage in a lawful business may not be arbitrarily denied to him or her and granted to another under the guise of regulation. The right of pursuing an ordinary calling or trade and of acquiring, holding, and selling property also embraces the right to make all proper contracts in relation thereto. Similarly, an individual is ordinarily free to choose to close down and discontinue the operation of his or her business.

Observation: It has been held that a state monopoly which is operative in the field of general business interferes with the constitutional rights of every person to life, liberty, and property.

593 Limitations

Although the legislature is without power to prohibit a legitimate business, the right to a business, occupation, or calling, although constitutionally protected, is not beyond all regulation and limitation. All businesses and occupations, including lawful callings, are subject to regulation by means of proper exercise of the state's police power. Restrictions and regulations may be imposed within proper limits without in any way impairing the fundamental right to engage in occupations. And the liberty to conduct a business so as to injure the public at large or any substantial group is not protected.

Regulation of a business which actually results in prohibiting such business does not constitute a "taking" under the Fifth Amendment when the regulation promotes the health, safety, welfare, or morals of the community and thus is a valid exercise of the police powers; as long as the police power is validly exercised, even a previously lawful business may be prohibited. Moreover, the Fourteenth Amendment does not protect a business against the hazards of competition, with the result that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, and compete with private interests engaged in a like activity. States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as they do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. And states have authority to regulate a profession, and doing so does not violate any property right.

594 Generally

Although the term "freedom of contract" does not appear in the United States Constitution, and has been described as an abstract doctrine, it is nonetheless a part of the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

Observation: The section of the Federal Constitution which provides that no state shall pass any law impairing the obligation of contracts restricts the states from passing laws which affect existing contractual obligations, but does not create a specific constitutional right to freedom of contract.

The freedom to contract is also safeguarded by the constitutions of most of the states.

The liberty guaranteed by the Due Process Clause of the Fourteenth Amendment embraces the right to enter into all contracts proper, necessary, and essential to the carrying out of the purpose of a lawful calling. Absent a statutory prohibition or some other public policy impediment, the very essence of freedom of contract is the right of the parties to strike both good bargains and bad bargains. Thus, the parties to a contract have the right to make contractual provisions among themselves and the courts will not limit this freedom to contract except under certain situations, such as the provision being against public policy, made under fraud or duress, and other considerations where the court in a legal proceeding has before it the unreasonableness of the contract provision. The freedom of contract also entails the freedom not to contract, except in the case of innkeepers, common carriers, and certain other public service companies, and except as restricted by antitrust, antidiscrimination, and other applicable statutes.

Included in the right of personal liberty and the right to private property is the right to make contracts for the acquisition of property.

The privilege of contracting is both a liberty and a property right. Indeed, the right to contract, freedom of contract, or liberty of contract exist as a necessary inference from, or corollary to, the express constitutional guarantee of rights of property. And the right of a citizen of the United States resident in one state to contract in another is also a privilege protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

While the freedom to contract is not absolute, and is subject to limitations, within such limitations all parties are free to make whatever contracts they please, so long as no fraud or deception is practiced and the contract is legal in all respects. This right extends to business entities.

Freedom of contract between private parties is an important civilizing concept, and courts should respect the agreements people reach and resolve disputes thereunder according to objective principles that do not favor one class of litigants over another, regardless of whether a party's decision to contract was prudent. Thus, unmarried persons who are living together have the same rights to lawfully contract with each other regarding their property as do other unmarried individuals; their agreement may be express or implied from their conduct.

Valid contracts have the status of property for the purpose of the guarantee of due process of law, and as such are protected from being taken without just compensation, whether the obligor is a private individual, a municipality, a state, or the United States.

The liberty of contract guaranteed by the constitution is freedom from arbitrary or unreasonable restraint, but it is not absolute; liberty of contract is subject to the restraints of due process. Public policy strongly favors the freedom to contract as is manifest in both the United States and state constitutions. Ordinarily, sui juris persons are free to contract as they wish with respect to their property rights, and a court will not annul their agreement unless the agreement is contrary to law.

On the question whether the liberty to contract is a fundamental right, the courts are not in agreement. Some courts have stated that the liberty is not to be so characterized, and those courts have noted that the right of liberty of contract differs from a fundamental constitutional right, from the right of liberty of the body or person, from the right of property, including the obligation of existing contracts, from the right of equality, and from the right of political liberty, in that it is not a vested right, a right of definite content, or a right protected by specific constitutional guarantees. Other courts have held that liberty of contract is a fundamental right.

The rights of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property embrace the right to make all proper contracts in relation thereto. There is no legal or equitable right requiring a party to involuntarily contract with another party.

595 Exceptions

The general rule that all persons possess a liberty of contract guaranteed from interference is subject to a number of exceptions. One of these is that the constitutional protection afforded is not protection against breach of a contract. In addition, it has been held that freedom of contract does not operate in behalf of governmental agencies and political subdivisions so as to inhibit the legislature from limiting or prohibiting their right of contract. And a third exception to the general principle is that the constitutional guarantee of liberty of contract does not apply to children of tender years.

The rule of freedom of contract which prevails as to private contracts is not applicable to contracts in which the public in general has an interest.

596 Limitations

The general rule is well settled that freedom of contract is not absolute, unlimited, or universal. Liberty of contract under the Constitution is necessarily subject to the restraints of due process, and a regulation which is reasonable in relation to its subject and is adopted in the interests of the community in due process is entirely proper. Although the general rule of law favors freedom of contract, equally fundamental with the private right to contract is the public's right to exercise its police power and to regulate the private right to contract in the common interest. Hence, the right is relative to many conditions of time, place, and circumstance, and is subject to reasonable limitations. And, without regard to its source, the sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.

In every case where limitations are sought to be imposed, it must be remembered that freedom of contract is the general rule and restraint the exception, and that the exercise of legislative authority to abridge freedom of contract can be justified only by the existence of exceptional circumstances. The right to contract with respect to one's property is not to be taken away lightly.

The matter of freedom of contract runs the whole gamut of human relations. As one of many examples that could be given, "sale below cost" legislation, sometimes referred to as "predatory pricing" legislation, does not impermissibly interfere with the liberty interests protected by a state constitution, as long as the legislation is designed to accomplish an end within the legislative competence and as long as the means which the legislature employs are reasonably designed to accomplish that end without unduly infringing on such liberty interests. As another example, a limitation in a state medical malpractice act upon attorney's fees to be paid to counsel for patient claimants does not unconstitutionally interfere with the individual's right to contract and to earn a living and does not violate the Due Process and Equal Protection Clauses.

597 By Congress

Congress may regulate the making and performance of contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created. For example, in the regulation of commerce with foreign nations and among the several states, Congress may circumscribe the individual's liberty of contract, but Congress cannot abridge freedom of contract under a statute which is not actually within the purview of interstate commerce, and a law purporting to regulate such liberty under the mere guise of regulating interstate commerce is invalid. Congress may also regulate the making and performance of contracts in the exercise of its wartime powers.

598 By states; contracts involving extraterritorial elements

The states may regulate and limit liberty of contract provided that the limitations imposed are reasonable. Such state regulation is generally exercised by means of the police power for the promotion of the health, safety, morals, and welfare of the inhabitants of the states; and there is no absolute right to contract free of state regulation under the police power.

The Due Process Clause of the Fourteenth Amendment has very greatly restricted the power of a state to impose conditions substantially affecting foreign rights sought to be enforced within its borders, if jurisdiction is assumed by the courts of a state of an action involving the enforcement of such rights.

The United States Supreme Court has established the rule that because of the Due Process Clause, a state statute cannot modify the substantive rights involved in a contract, the operation of which is extraterritorial or substantially so as far as the state is concerned. A state cannot extend the effect of its laws beyond its borders so as to destroy or impair the right

of citizens of other states to make a contract not operative within its jurisdiction and lawful where made. A state may not prohibit one of its citizens from making contracts outside its limits and jurisdiction where they are to be performed outside the state. It follows that a state statute, placing a limitation upon the power to enter into particular contracts, can reach only contracts made within the state. Moreover, it may not prohibit one of its citizens from doing an act which is merely the performance of a condition rendered necessary by the provisions of such a contract affecting property which is located within its borders. Furthermore, it may not, in an action based upon a contract lawful where made and operative, enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizens. Obviously, the place where the contract is made is of the utmost significance in determining the application of these rules, for where the contract is entered into within a state, its terms, obligations, and sanctions are subject, in some measure, to the legislative control of such state, notwithstanding that such a contract is to be performed elsewhere.

599 Nature of permissible limitations

Concerning the general nature of the limitations which may be imposed upon the liberty of contract, the Supreme Court has stated that the power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to affect injuriously the public interests; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The constitutional right to contract may not be invoked to guarantee a supposed right of one to make or enter into contracts which are illegal and properly forbidden, and contracts against public policy. Moreover, liberty of contract is not necessarily violated by legislation indirectly operating as a deterrent because it restricts dealings which may have become associated with a contract. And a statute does not violate the Due Process Clause because it creates a condition of affairs which renders the making of a related contract, lawful in itself, ineffective.

Under state action, the right of contract may, within constitutional limits, be abridged, enlarged, or destroyed. Thus, a state may limit the making of certain contracts within its territory, and it may prohibit and declare invalid the making of certain contracts within its borders, for the Fourteenth Amendment does not guarantee to the citizen the right to make any contract within a state, either directly or indirectly, where the making thereof is constitutionally forbidden by such state. And a state may require certain mandatory obligations in connection with the contracts involved in contractors' bonds or with other similar matters arising in relation to construction of materialmen's liens.

600 Rights under judgment or decree

Rights acquired by a judgment are property rights which cannot be taken without due process of law. Thus, the right to enforce payment of a judgment is a property right which is beyond the power of a state to destroy. But where a judgment creditor has actually received on account of his or her judgment all that he or she is entitled to receive, the creditor cannot be said to have been deprived of his or her property. A party cannot be said to be deprived of his or her property in a judgment because at the time he or she is unable to collect.

Since an injunction decree does not create a right, its modification cannot be considered as an unconstitutional deprivation of property without due process of law.

601 Rights as to liability; imposition of liability

The rules governing the imposition of liability raise fundamental questions of taking of property rights. The state has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive and in the use of which absolute control is impossible, whether the one using the agency is a private person or a corporation. And a corporation's interest in its trade secrets is not a constitutionally protected property interest for purposes of determining whether the corporation's interest in protecting documents produced in connection with a products liability action is sufficient to overcome the presumption of openness and allow the sealing of documents. But the constitutional right to acquire, possess, and protect property prevents making a man liable for the acts and engagements of strangers over whom he or she has no control.

Punitive damages may be allowed without violating due process. However, it is possible for an award of punitive damages to be grossly excessive under particular circumstances, and as such violative of due process.

602 Statutory rights

Rights acquired under a statute, duly adjudged to be constitutional, are valid legal rights that are protected by the constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is subsequently adjudged invalid, even though the statute was considered valid by eminent attorneys, public officers, and others.

While legislative power generally includes the power to repeal existing laws as well as the power to enact new laws, the repeal or amendment of a statute can be precluded by the Due Process Clause where vested rights have accrued under the statute.

603 Generally

The right of privacy, as an independent and distinctive legal concept, and as one of the major fundamental constitutional rights, has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy; and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion. The protection of privacy afforded by some constitutions does not extend so far as to protect private citizens against actions of private individuals; the federal and most of the state constitutional provisions which expressly protect an individual's privacy interests apply to state action only. In addition, the impact on a claimant's privacy rights must be more than slight or trivial in order to support a constitutional claim for violation of his or her right to privacy.

Observation: No invasion of an individual's right to privacy exists as a result of the disclosure of material when the material disclosed is already known to the recipient or where the information is readily available to the public.

While the Federal Constitution does not explicitly mention any right of privacy, the Supreme Court of the United States has declared that the right of privacy is a fundamental right guaranteed by the Federal Constitution. The Federal Constitution promises that there is realm of personal liberty which the government may not enter, and the result is a right of personal privacy, or a guarantee of certain areas or zones of privacy. The rights included within that zone are deemed fundamental and include activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. They involve the most intimate and personal choices a person can make in his or her lifetime, and include choices central to the liberty protected by the Fourteenth Amendment.

Congress adopted the view that the right of privacy is a fundamental right protected by the Constitution when it enacted the Privacy Act of 1974. A person's general right of privacy has been described by the Supreme Court and other courts as "the right to be let alone."

604 Sources of right; relation to other rights specified in Constitution

The right of privacy is rooted in, and exists in the "penumbra" of, various specific constitutional provisions which have been deemed to create "zones of privacy," such as the First Amendment's guarantee of free speech and press and of freedom of association, the Third Amendment's prohibition of peacetime quartering of soldiers in any house without the owner's consent, the Fourth Amendment's prohibition of unreasonable searches and seizures, the Fifth Amendment's privilege against self-incrimination, and the Ninth Amendment's reservation to the people of rights not enumerated in the Constitution. Courts have also stated that the right of personal privacy is one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment, and that the right is also in part derived from natural law.

Observation: Though the common-law tort of invasion of privacy does not control a federal constitutional claim, the tort as defined by the Restatement provides some guidance as to what constitutes a reasonable expectation of privacy for purposes of the constitutional right of privacy.

Where the right of privacy conflicts with other constitutional rights, each case ultimately must depend on its own specific facts.

605 Scope of, and limitations on, right; generally

The Supreme Court and other courts have held or recognized that the Federal Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, contraception, abortion, motherhood, family relationships, child rearing, and education.

Observation: There is no rule of private or public conduct that makes it illegal per se, or a condemned violation of a person's right of privacy, for anyone openly and peaceably to walk up the steps and knock on the front door of any man's "castle," whether the questioner be a pollster, salesman, or officer of the law. U.S. v. Taylor, 90 F.3d 903 (4th Cir. 1996). Among other areas of privacy are political privacy and privacy of communications or records,

Practice guide: In order to show that a constitutional privacy interest has been impaired, a plaintiff must demonstrate that the defendants failed to keep private information which was personal to him or her and which he or she legitimately expected would remain confidential while in the possession of the state. Patrick v. City of Overland Park, Kan., 937 F. Supp. 1491 (D. Kan. 1996). personal financial matters, and first-class mail.

Caution: No federal constitutional right to privacy in one's criminal or police record exists; arrest and conviction information are matters of public record.

The right to make decisions regarding one's own bodily integrity and medical treatment is embraced in the federal constitutional right of privacy. However, only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the federal guarantee of the right of personal privacy, and not every government disclosure of personal information invokes constitutional protection. For instance, a person does not have any federal constitutionally protected privacy interest in the facts of a crime committed against that person. One's telephone number is not among the select privacy interests protected by the federal constitutional right to privacy. A Social Security number is not within one of the zones of privacy recognized by the United States Supreme Court as fundamental or implicit in the concept of ordered liberty; the Social Security number has nothing to do with a person's most basic decisions about family, parenthood, or bodily integrity. A state's publication of an arrest does not violate the arrestee's right to privacy as guaranteed by the Federal Constitution. The government has the requisite interest in tax administration to pass constitutional muster, and the federal income tax information confidentiality and disclosure statute is sufficiently related to that interest, without unnecessarily infringing on any privacy rights that a taxpayer might have in his or her tax information. The right of privacy is not concerned with a particular place, but with a protected intimate relationship. Ordinarily not protected by considerations of privacy are persons in public places -- such as on public streets, in a courthouse corridor, on public conveyances, or in theaters. A witness before a grand jury ordinarily has no constitutional right of privacy.

Obscene material unprotected by the First Amendment does not in itself carry a penumbra of constitutionally protected privacy; with regard to the First Amendment right of an individual to possess obscene material in the privacy of his or her home, such privacy of the home is not to be equated with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he or she goes.

Caution: Note also that possession of child pornography within a home is neither protected by the First Amendment nor by the constitutional right of privacy within the home. Davis v. State, 916 P.2d 251 (Okla. Crim. App. 1996).

606 Absolute or conditional nature of right of privacy

A number of state and federal courts have held that the right to privacy is not absolute, and it has been stated that, as a general proposition, some state regulation in areas protected by the right of privacy is appropriate, but that where "fundamental rights," such as the right of privacy, are involved, any state regulation limiting these rights may be justified only by a "compelling state interest," and legislative enactments regulating such rights must be narrowly drawn so as to express only the legitimate state interests at stake.

Practice guide: In determining whether the government may seek or use private information, courts balance the government's interest in having or using the information against the individual's interest in denying access. Factors which must be considered in reaching a fair balance of competing interests include the type of information requested, the potential for harm in any subsequent nonconsensual disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the degree of the need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

The Supreme Court has pointed out that virtually every governmental action interferes with personal privacy to some degree; and that the question in each case is whether that interference violates a command of the United States Constitution.

607 Privacy rights based on state constitutional provisions

Privacy interests are a matter of particular state interest and local concern, for purposes of determining, as is often the case, whether a state constitutional provision provides broader protection for privacy than parallel a federal constitutional provision. Determining whether a particular privacy interest has been unduly invaded, so as to violate a state constitutional provision that no person should be disturbed in that person's private affairs, or the person's home invaded, without authority of law, requires consideration of whether the privacy expectation is objectively reasonable, and also whether it is one that has been traditionally held.

Practice guide: A plaintiff alleging invasion of privacy in violation of a state constitutional right to privacy must establish a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by the defendant constituting a serious invasion of privacy. The defendant may prevail in a state constitutional privacy case by negating any of the three required elements or by pleading and proving, as an affirmative defense, that an invasion of privacy is justified because it substantially furthers one or more countervailing interests. The plaintiff may rebut a defendant's assertion of a countervailing interest by showing there are feasible and effective alternatives to the defendant's

conduct which have a lesser impact on the privacy interest; of course, the defendant may also plead and prove other available defenses, such as consent or unclean hands, that may be appropriate in view of the nature of the claim and the relief requested. Various factors such as advance notice, customs, practices, justification, physical settings, and presence of opportunity to consent may inhibit or diminish reasonable expectations of privacy for purposes of a cause of action for invasion of a state constitutional right of privacy.

A number of cases involving the right to privacy have been based on state constitutional provisions guaranteeing the right to privacy for their citizens. It has been held, for instance, that a criminal defense attorney's unauthorized reading and dissemination of a rape victim's confidential mental health record violates the victim's state constitutional right of privacy. A state constitutional right to privacy has been held to guarantee that a competent person has a constitutional right to choose or refuse medical treatment; that right extends to all relevant decisions concerning one's health. A state constitution was held to support greater privacy protection for driving records than the Federal Constitution, where state statutes emphasized the confidentiality of those records and limited their availability. On the other hand, a student-athlete who was suspended from playing after testing positive for an anabolic steroid testosterone had, under a state constitution, a diminished expectation of privacy, and the small compromise of privacy as a result of the required urine test was outweighed by the significant interest of the university and the NCAA.

A state constitutional right to privacy has been held not to include the right to assisted suicide.

Where one participant in a conversation has consented to the recording of the conversation, the recording does not violate the state constitution, since there is no expectation of privacy where one party consents to the recording.

Mortgagors have been held to have no state constitutional right of privacy against a mortgage lender's disclosure of financial records relating to the mortgage, especially where the lender is not a government entity, but a privately owned bank.

Application of a statute prohibiting possession of a firearm on the person while impaired by intoxicating liquor to persons in their own homes or on their own property does not violate a state constitutional provision protecting an individual's right to privacy.

Under many state constitutions, just as with the Federal Constitution, the constitutional right to privacy includes an interest in freedom from unjustified governmental interference in personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education. But a state law which would allow disclosure to appropriate parties of previously confidential adoption records is not a violation of the right of privacy. Depending on the state involved, in many instances involving the privacy right to nondisclosure of intimate personal information or confidentiality, the state constitution has been held to offer no greater protection in this regard than the Federal Constitution, which requires only the application of the rational basis test.

Observation: Misuse of information that was properly obtained for another purpose can form the basis of a claim for violation of a state constitutional right to privacy.

Usually, the test of whether a fundamental right of privacy under a state constitution is outweighed by a compelling state interest is whether there is such an interest in discovering the information; the public interest in preserving confidential information must outweigh in importance the interest of the private litigant.

608 Validity of state laws and regulations affecting privacy

Some state regulation in areas protected by the right of privacy is permissible, but because fundamental rights are involved, any regulation limiting these rights must be justified by a compelling state interest. A wide variety of statutes and regulations, affecting both civil and criminal matters, have been challenged on the grounds of unconstitutional invasion of privacy. Where an overriding or compelling governmental interest was found, or the claim of privacy was nebulous or unsubstantiated, the statutes or regulations at issue have been sustained. Illustrative of such situations are cases involving statutes, rules, or regulations pertaining to --

-- prostitution.

-- sodomy.

-- same-sex marriages.

-- confidential medical records.

-- filing of certificates of termination of pregnancy.

-- identification of prescription drug patients by doctors.

-- sale and use of marijuana.

-- involuntary commitment of mentally ill persons.

-- public disclosure of personal financial affairs of public officials or employees or of political contributions.

-- industrial espionage.

-- dress and hair codes or regulations for public school students.

-- university parietal regulations requiring dormitory residence by unmarried undergraduate students.

-- screening procedures for determining the character and fitness of applicants for admission to the bar.

-- fingerprinting and photographing applicants for a license to engage the in business of massage.

Conversely, where a compelling and legitimate governmental interest was not found, statutes or regulations have been struck down. Illustrative are cases involving statutes or regulations pertaining to --

-- Contraceptives.

-- abortion.

-- showing of films containing nudity in drive-in theaters.

-- house-to-house peddling or canvassing. 150/1

609 Relation to federal statutes, rules, and constitutional rulings

Questions of privacy are sometimes relevant in construing federal statutes such as the Omnibus Crime Control and Safe Streets Act, the Presidential Recordings and Materials Preservation Act, the Bank Secrecy Act, statutes relating to obscene materials, or the Federal Communications Act, as well as in construing federal rules such as the Federal Rules of Civil Procedure.

Observation: The physician-patient privilege that protects from disclosure medical records and confidential communications between a physician and patient is but a rule of evidence, and has no bearing on whether the patient has a privacy interest protected by the Federal Constitution.

610 Applicability of right to corporations and other organizational entities

Corporations and other organizational entities ordinarily do not enjoy constitutional rights of privacy, at least not to the same extent as individuals. Thus, the Federal Trade Commission has power to require a corporation to file a report showing how it has complied with a court decree enforcing the Commission's cease and desist order, and a substantial claim of privacy cannot be maintained with respect to the financial records of an organized collective entity. On the other hand, while it has been recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context, it cannot be claimed that corporations are without some Fourth Amendment rights. Thus, it has been held that there is no broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in furtherance of enforcement of the tax laws, and in this respect there is no justification for treating a corporation differently than a private individual.

611 Applicability of right to employees of corporations and other organizational entities

Employers have important and legitimate interests in maintaining an efficient and productive work force, and they consequently have substantial latitude in regulating employees' on-the-job conduct and working relationships, despite the constitutional right to privacy. Employees lack any objectively reasonable expectation of privacy against a disclosed, soundless video surveillance while toiling in an open and undifferentiated work area, because they lack any fundamental right to be free from surveillance.

Employers do have a legitimate and compelling interest in maintaining a safe working environment for their employees, for purposes of justifying an invasion of the employees' constitutional right to privacy. However, employers do not have any cognizable interest, for purposes of justifying an invasion of the constitutional right to privacy in dictating the course of medical treatment for employees who suffer nonindustrial injuries, inasmuch as employees have the right to

decide such matters in consultation with their own health care providers, who are medical professionals who have their patients' best interests at heart.

Observation: Individuals, such as family members, who do not participate in corporate matters that might reasonably become the subject of government inquiry have a greater "reasonable expectation of privacy" in their personal financial affairs than do those individuals who, as corporate employees or directors, do participate in such matters.

612 Generally; nature of right

The right of a citizen of one state to pass into any other state of the Union or to reside therein for the purpose of engaging in lawful commerce, trade, or business without molestation is secured and protected by the United States Constitution. In other words, citizens have a fundamental right of free movement. Sometimes referred to as the "right to migrate," this right protects residents of a state from being disadvantaged or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.

Observation: States may not violate the constitutional right to travel by conditioning public benefits or political rights on term of residency, but states may condition nonessential benefits and rights, such as lower college tuition and dissolution of marriage, on a term of residency; likewise, states may impose bona fide residence requirements to ensure that services and benefits go to actual residents of the state.

This right to travel is a fundamental right subject to the strict scrutiny test under the United States Constitution. However, minor restrictions on travel do not amount to a denial of the fundamental right to interstate travel. A state law implicates the constitutional right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which it serves to penalize exercise of that right. Thus, in addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents.

Observation: The federal guarantee of interstate travel does not transform state law torts into federal offenses when they are intentionally committed against interstate travelers; rather, it protects interstate travelers against two sets of burdens -- the erection of actual barriers to interstate movement and being treated differently from intrastate travelers.

613 Constitutional basis of right

The constitutional basis of the right of travel is said to rest on a variety of constitutional provisions, including the Privileges and Immunities Clause of Article IV, ß 2 of the Constitution; the Privileges and Immunities Clause of the Fourteenth Amendment; and the Due Process Clause of the Fifth Amendment. Other cases have suggested that the right of interstate travel is based on general constitutional principles, or have considered it unnecessary to base this right on any particular constitutional provision. In at least one case, a state court has ascribed the right to travel and to live where one chooses to the penumbra of rights which the Supreme Court has found and declared to be fundamental around the Bill of Rights. And another court has stated that the right to travel, to go from place to place, is a natural right, though subject to the rights of others and to reasonable regulation under law. There is no constitutional right to a particular mode or manner of travel.

614 To whom right of travel is applicable

Whatever may be the scope or basis of the constitutional right of interstate travel, all citizens, including new residents and aliens lawfully within the United States, have a right to enter and abide in any state on an equality of legal privileges with all other citizens under nondiscriminatory laws. Minors are protected by the right to travel, with, however, reduced expectations in some instances; and mental patients retain the constitutionally guaranteed right to freedom of bodily movement. In fact, all persons, including indigents and other migrants, have a right of free travel.

The right to travel, being a personal liberty interest, has not been extended to protect the interstate sale of goods.

615 Intrastate travel

Many state courts and a number of federal courts have considered, and reached differing conclusions as to, whether the Federal Constitution guarantees the fundamental right of intrastate travel. The Supreme Court has declined to decide the issue.

Residency requirements for candidates for public office and for various public employees have been sustained. However, some juvenile curfew ordinances have been held to impinge on minors' fundamental rights of free movement and to travel intrastate, and therefore to be subject to a strict scrutiny analysis for purposes of evaluating the minors' equal protection challenge. A "sitting ordinance" that prohibits sitting or lying on a sidewalk in the downtown or other neighborhood commercial zones between 7:00 a.m. and 9:00 p.m. does not implicate the constitutional right to travel since it

does not exact a penalty for moving within the state or prohibit a homeless person from living on the street and does not increase the difficulty of migrating from one state to another. And a local "anticruising" ordinance is a reasonable time, place, and manner restriction on the right of localized intrastate travel.

A number of state constitutions contain provisions establishing a state constitutional right to travel within the state.

616 International travel

The right to travel outside the United States (and to have a passport allowing it) is part of the "liberty" of which a United States citizen cannot be deprived without due process of law under the Fifth Amendment; if that "liberty" is to be regulated, it must be pursuant to the lawmaking functions of the Congress, and if the power to regulate is delegated, such delegation must be accompanied by standards which are adequate to pass scrutiny by accepted standards. However, the right to travel abroad is not absolute, and the President, by acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States. The United States also may enter into treaties governing international travel. Thus, a provision of the Warsaw Convention prescribing where an airline traveler, injured when hit on the head by a metal box which fell from an overhead compartment on an airplane, must bring suit does not deprive a traveler of his or her constitutional rights to due process or travel.

Observation: The freedom of international travel is not basically equivalent to the constitutional right to interstate travel, since even though the constitutional right of interstate travel is virtually unqualified, nevertheless the "right" of international travel, which has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment, can be regulated within the bounds of due process; thus, legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements imposed by the states.

Although the Constitution inhibits every state's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States; the power of Congress to prevent travel of aliens into the United States cannot seriously be questioned. Thus, a section of the Federal Social Security Act, which prohibits Supplemental Security Income (SSI) payments for the needy, aged, blind, and disabled for any month that the recipient spends entirely outside the United States, does not impose an impermissible burden on the freedom of international travel, and is constitutional. And a provision of the Social Security Act which denies eligibility for the Medicare supplemental medical insurance program to aliens who are 65 or older unless such aliens have been admitted for permanent residence and also have resided in the country for at least five years is constitutional because, whereas the Constitution inhibits every state's power to restrict travel across its own borders, Congress has power to exercise such type of control over travel across the borders of the United States.

While a news reporter's right to travel abroad is a part of freedom of the press, it does not mean that he or she can go anywhere he or she wishes; the right is subject to reasonable restrictions by the government.

617 Limitation or restriction of right

The constitutional right of interstate travel is not an absolute right, and it is subject to reasonable restriction. Laws which burden the right to travel or migrate must be shown to be necessary to further a compelling state interest in order to be sustained. There may be instances where the governmental interests served by certain restrictions outweigh the burdens imposed upon the right of interstate travel, in which case the restrictions will not be held unconstitutional. Thus, in an emergency situation, fundamental rights such as the right of travel may be temporarily limited or suspended. And, despite the fundamental nature of the right, there are other situations in which a state may prevent a citizen from leaving, such as when a person has been charged with, or convicted of, a crime within a state, he or she may be detained within that state, and returned to it if he or she is found in another state. However, any restriction on the constitutionally protected right to travel which is not shown to be necessary to promote a compelling governmental interest will be held unconstitutional.

618 Particular governmental action as violating right

The constitutional right of interstate travel has been relied upon as a basis for upholding the validity of federal legislation prohibiting states from disqualifying persons from voting in presidential elections because of failure to meet state residency requirements. The right to travel has also been invoked to invalidate --

-- a governmental residency requirements for recipients of welfare benefits.

-- a state's dividend distribution program, favoring longtime residents over new residents.

-- a state statute punishing a nonsupporting father who remained outside the state for 30 days as a felon while punishing a nonsupporting resident father only as a misdemeanant.

-- a state statute prohibiting alcoholic beverage licensees from employing nonresidents of the state.

-- a state restriction of its civil service preference to veterans who entered the armed forces while residing in that state.

However, a federal statute making it an offense for a felon to possess a firearm in interstate commerce has been held not to violate a defendant's constitutional right to travel from one state to another. With regard to state legislation or action, no federal constitutional right of interstate travel is violated where --

-- state statutes impose taxes or fees which are deemed to have merely an indirect effect upon interstate travel.

-- the right to a real estate tax abatement to persons over 70 years of age depends on such persons having owned and occupied their homes for at least 10 years.

-- a state statute requires a nonresident plaintiff to post bond covering the anticipated costs and attorney's fees which may be awarded against him or her.

-- a whitewater rafting law requires all noncommercial rafters to file a registration statement prior to engaging in that activity.

-- a state statute authorizes a person to be compelled to appear as a witness in judicial proceedings in another state.

A bona fide residence requirement of a Texas statute, which was appropriately defined and uniformly applied with respect to attendance in free public schools, and which permitted a school district to deny tuition-free admission to its public schools for a minor who lived apart from a "parent, guardian, or other person having lawful control of him" if his or her presence in the district was "for the primary purpose of attending the public free schools," does not burden or penalize the constitutional right of interstate travel. A state's one-year residency requirement as a prerequisite for a divorce in the state has been sustained, as have rules or regulations requiring local residence for continued public employment or for unemployment insurance benefits. A city ordinance banning camping and storage of personal property in public areas such as parks does not violate the right of homeless persons to travel. Excluding from college campuses individuals who have flouted the basic rules of order does not implicate the broad concept of freedom of movement embraced in the constitutional right to travel. The constitutional right to travel does not encompass using state highways in an unrestrained manner, operating a motor vehicle without a valid driver's license, or exceeding the speed limit. A state's constitutional provision, permitting the state to provide assistance to a handicapped student attending any college within the state or any nonsectarian college outside of the state, does not infringe on a student's fundamental right to travel. State regulation of the practice of law which may inhibit travel does not per se constitute a constitutional violation. A state bar admission rule prohibiting graduates of unaccredited law schools from sitting for that state's bar examination unless they have been members of the bar of a reciprocal state and have practiced there for five years, is subject to a rational basis review rather than strict scrutiny; although the rule has the practical effect of making such attorneys ineligible to practice in the state, it does not so impinge on the attorneys' freedom of movement as to trigger strict scrutiny. An increase in the toll for use of bridges and tunnels connecting two states does not violate residents' constitutional right to travel, where the residents of each state pay the same amount of money, the increase represents a fair approximation of the use conferred, and the tolls are not excessive. A stalking statute, which prohibits the persistent following of another on public roads, does not violate a defendant's constitutional right to travel, where the statute was designed to achieve the significant governmental objective of preventing emotional harm to victims, the definition of harassment in the statute was narrowly tailored, and travel on public roads was not restricted if the adverse effects were unintentional or if the travel served a legitimate purpose. And "parietal" regulations or policies of colleges or universities requiring unmarried full-time undergraduate students to reside in campus dormitories or residence halls have been upheld against the challenge that they unconstitutionally violated the right of travel of students. Also, a village zoning ordinance prohibiting occupancy of one-family dwellings by more than two unrelated persons, but allowing occupancy by any number of persons related by blood, adoption, or marriage, was held not aimed at transients and thus did not violate a person's right of interstate travel.

On the other hand, a workers' compensation statute which adjusted the benefits of workers' compensation recipients who moved out of the state based on the average weekly wage of the state to which the recipient moved imposed a substantial penalty upon the exercise by recipients of the right to travel out of state, and was thus unconstitutional. And a

local residency requirement for the position of recreation superintendent of a city, which requirement acted to disqualify a state resident who did not reside within the city, implicated the fundamental right to travel freely within the state, did not pass the test of "strict judicial scrutiny," and was therefore invalid.

619 Protection of right from interference by private parties

The constitutional right of interstate travel is a right which is secured not only against governmental interference, but also against interference by private parties. Thus, the constitutional right of travel of black citizens will be protected against interference by private parties through intimidation, threats, or assaults.

620 Guarantee of free justice and open courts; generally

The right of access to the courts is constitutionally protected and cannot be denied.

Observation: It has been held that a state constitutional "open courts" provision includes at least three separate guarantees: (1) the courts must actually be operating and available; (2) the legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.

A constitutional right of access to the courts is not an absolute right.

It has been held that to make a colorable claim of denial of access to the courts, an aggrieved party must demonstrate that the legislature has abolished a common-law right previously enjoyed by the people of the state. While there is no inherent right to the judicial process, the state may not withhold this process when to do so would deprive a person of this fundamental constitutional right.

In most, but not all, of the state constitutions there are provisions, varying slightly in terms, which stipulate that justice shall be administered to all without delay or denial, without sale or prejudice, and that the courts shall always be open to all alike. In other words, if there is a statutory foundation for a lawsuit, a plaintiff has a right to his or her day in court.

Caution: Public policy mandates free access to the courts; however, when a litigant is abusing the judicial process by "hagriding" individuals solely out of ill will or spite, a court of equity may enjoin such vexatious litigation.

These provisions are based largely upon the Magna Carta, which provides: "We will sell to no man, we will not deny to any man, either justice or right."

Practice guide: In order to establish an open courts violation, a plaintiff must satisfy two criteria: (1) that he or she has a well-recognized common-law cause of action that is being restricted, and (2) that the restriction of his or her claim is unreasonable or arbitrary when balanced against the purpose of the statute.

A constitutional provision that right and justice shall be administered according to such guarantees is mandatory upon the departments of government. Hence, it requires that there shall be no unreasonable and unjustifiable delays in the administration of justice, and that a cause shall not be heard before a prejudiced court. These guarantees cannot be destroyed, denied, abridged, or impaired by legislative enactments.

A constitutional provision guaranteeing to residents of the state the right to resort to the courts on equal terms with others does not preclude the courts from making a reasonable classification of litigants in determining whether to retain jurisdiction of actions instituted by them. And where access to the judicial process is not essential to the exercise of a fundamental right, the legislature is free to restrict access to the judicial machinery if there is a rational basis for that restriction. The right to access to the courts will be accorded special constitutional protection only where the right sought to be asserted through such access is a right recognized in the constitutional sense as carrying a preferred status and so entitled to special protection, and then only where there is no alternative forum in which vindication of that constitutionally protected right may be sought.

While there is no specific reference to the right of open access to the courts in the Federal Constitution, it has long been held that such a right nonetheless exists as a necessary result of the inclusion in that document of the Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment.

621 Particular laws as constituting denial of free access

In some instances, litigants have pointed to specific laws they have alleged as infringing upon their right to free access to the courts, but with only occasional limited success. For instance, there is no constitutional right to obtain a discharge

of one's debts in bankruptcy; the mere fact that Congress has delegated to the United States District Courts supervision over the proceedings by which a petition for discharge is processed does not convert a statutory benefit into a constitutional right of access to the courts. Statutory limitations or "caps" on noneconomic damages, under which a court may not award noneconomic damages exceeding a certain amount unless it finds by clear and convincing evidence that a greater award is justified,have been held not to violate a state constitutional right of access to the courts. And an automobile no-fault insurance statute does not violate an open courts provision.

622 Effect of guarantee upon payment of court costs and fees

Legislation and orders concerning costs and fees have often been assailed under constitutional provisions insuring justice without sale. It is a general rule that reasonable costs may be imposed on litigants without violating these constitutional guarantees. However, court filing fees may be imposed only for purposes relating to the administration of justice, to conform with the constitutional right of access to the courts. Indigents have been afforded protection in many respects so that they will not be denied access to the courts. However, the state constitutions and rules of procedure in most states recognize that the courts must be open to all with legitimate disputes, not just to those who can afford to pay fees to get in.

A statute violates the right of equal access to the courts when for attorney's fee purposes it treats a victorious plaintiff differently from a successful defendant. An award of attorney's fees pursuant to a commodity futures brokerage contract providing for such an award does not violate a state's public policy of open access to its courts. Requiring an insurance company to pay a penalty and attorneys' fees if compelled to pay a loss which it fails to pay within the time specified in a contract does not tend to prevent a resort to the courts, in contravention of a constitutional requirement that all courts shall be open.

623 Guarantee of remedy for all injuries; generally

A provision guaranteeing to every person a remedy by due course of law for injury done to his or her person or property (and usually also for injury done to the person's reputation) is found in the constitutions of many of the states. It means that for such wrongs as are recognized by the law of the land, the courts shall be open and afford a remedy, or that laws shall be enacted giving a certain remedy for all injuries or wrongs. This provision was designed to implement the maxim that for every wrong there is a remedy, and to effectuate the security and enjoyment of the "inalienable rights" guaranteed by the Constitution. It assumes that for every injury done to an individual in his or her lands, goods, person, or reputation there is a remedy provided by law either by the statutes or by the common law in effect at the time the state constitution was adopted. "Remedy by due course of law" means the reparation for injury ordered by a tribunal having jurisdiction, in the due course of procedure, after a fair hearing.

Observation: The right of access to federal courts is not a free-floating right, but rather is subject to Congress' Article III power to set limits on federal jurisdiction, and Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them.

624 Effect and application; generally

A constitutional provision which guarantees a remedy for all injuries relates primarily to the assertion of affirmative rights. Thus, the word "injury" as employed in such a constitutional declaration implies the doing of some act which constitutes an invasion of a legal right as established by statutory or common law, and has reference to substantial invasion of rights and injuries that are not merely de minimis.

The constitutional guarantee of access to the courts and of a remedy for injuries does not warrant a remedy for every single injury. It cannot be considered as referring to all evils which may affect mankind; the Constitution does not provide judicial remedies for every social and economic ill.

Granting political subdivisions of a state absolute immunity from suits arising from injuries occurring on their property does not violate the provision of a state constitution guaranteeing a certain remedy for personal injuries; the statute does not preclude all recovery, but simply restricts the liability of one category of defendants. Likewise, a statute immunizing government employees from liability for acts or omissions occurring during the performance of their duties except in cases of fraud or malice does not violate the "open courts" provision.

The remedy guaranteed by the Constitution must be invoked by due course of law in appropriate proceedings in a court having jurisdiction of the matter presented for decision to afford the remedy sought. Such constitutional guarantee of a remedy does not, however, delegate strictly legislative power to the courts, nor does it authorize the courts to invade a legislative prerogative. Such a provision does not create any new right, but is merely a declaration of a general fundamental principle, although it does not prohibit the creation of new causes of action by due course of law.

It is a primary duty of the courts to safeguard the declaration of right and remedy guaranteed by a constitutional provision ensuring a remedy for all injuries, but such a provision is not violated solely because the granting of a remedy rests in the sound discretion of a court. Moreover, a guarantee in a state's Declaration of Rights of a certain remedy providing for recourse to the laws for all injuries or wrongs that one may receive has been held clearly directed toward the preservation of procedural rights, and does not prohibit alteration of common-law rights as such.

The refusal of a court to sign a bill of exceptions may amount to a denial of the right to have "justice administered without denial," as guaranteed by the Declaration of Rights. On the other hand, a statute exempting certain property from attachment, garnishment, or legal process is not invalid as violating the constitutional guarantee of a remedy for every injury.

625 Effect of statutes of limitations

In the ordinary course of events, a statute of limitations is not considered to be an unconstitutional limitation on the right of access to the court system or the guarantee of a remedy for all injuries. However, an occurrence-based statute of limitations, imposing an absolute time limitation in every case, has been deemed an unconstitutional abrogation of a right to a complete tort remedy, which is a right guaranteed by the "open courts" provision of various state constitutions. Thus, a statute of limitations enacted by a legislature has been held to deprive a patient of her "open courts" remedy where the limitations period expired before the patient knew or should have known that she had been injured by medical malpractice.

Practice guide: A state constitution's "open courts" provision may operate to set aside a statute of limitations by guaranteeing a would-be plaintiff a reasonable time in which to discover the nature of his or her injury and bring suit, even though a statute of limitations would declare the suit barred. When a claimant discovers an injury at a time when there is still a reasonable time to sue, the open courts provision will not operate to set aside the statute of limitations.

626 Who is entitled to remedy

Constitutional provisions guaranteeing a remedy to every person for every injury has been applied in a variety of instances to prevent the legislature from denying redress to the courts to certain persons, including aliens, public servants, such as a police officer, unborn viable children, and corporations.

Constitutional provisions guaranteeing the equal protection of the law imply that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination.

627 Generally; constitutional guarantees

Most of the state constitutions contain provisions which, although varying considerably in terminology and application, generally prohibit imprisonment for debt. Numerous court decisions can be cited construing such state constitutional provisions as so providing. Although there is no comparable provision in the United States Constitution, a federal statute provides that no federal court may imprison a person for debt in any state wherein imprisonment for debt has been abolished.

Observation: Community service is not incarceration; therefore, imposition of community service does not constitute imprisonment for debt.

In some states, the provision broadly declares "that no person shall be imprisoned for debt." Such inhibition is absolute and contains within its terms no exceptions. In some of such jurisdictions imprisonment for debt, even in cases of fraud, is held to be a violation of the state constitution. Elsewhere, it has been held that the legislature has power to authorize punishment, including imprisonment in some cases, under a similar constitutional provision, not as a punishment for debt, but for such an intentional fraud that through it the offender obtains the property of another without compensation.

Practice guide: Although a statute is ordinarily presumed constitutional and all doubt is to be resolved in favor of its constitutionality, every doubt must be resolved in favor of a citizen in the enforcement of a constitutional provision that no person shall be imprisoned for debt.

In many of the state constitutions the inhibition against imprisonment for debt exists only where the obligation out of which the claim arises is free from fraud, since the constitutions of many of the states except cases of fraud and make that a ground of imprisonment. Statutes enacted in such jurisdictions permitting imprisonment of a judgment debtor guilty of fraud have been upheld as a valid exercise of legislative authority.

The provision in the Federal Constitution forbidding state impairment of the obligation of contracts has no application to state abolition of imprisonment for debt. The states have a right to abolish such imprisonment even though it may have constituted a part of the remedy for enforcing the performance of contracts. Imprisonment itself, however, is in no sense a part of the contract, and the simple release of a prisoner does not impair a contract obligation.

Observation: Federal courts may not imprison a party for contempt when doing so would conflict with a state's prohibition against imprisonment for debt.

628 Purpose and construction of guarantees

Constitutional guarantees against imprisonment for debt have as their purpose the prevention of the useless and often cruel imprisonment of persons who, having honestly become indebted, are unable to pay as they undertook and promised. The spirit of such provision is to protect an honest debtor who is poor and has nothing with which to pay, so that the debtor should not be at the mercy of his or her creditors if his or her insolvency is bona fide, but it is not intended to shield a dishonest person who takes unconscionable advantage of another. Every doubt should be resolved in favor of the liberty of the citizen in the enforcement of a constitutional provision that no person shall be imprisoned for debt.

Practice guide: It has been held that an attorney representing a judgment debtor must be able to prove the debtor's honest inability to pay the debt in order to invoke a constitutional prohibition against imprisonment for debt; a defendant who is able to pay a debt, but contemptuously refuses to pay, may be imprisoned without violating a constitutional provision banning imprisonment for debt.

A prohibition against imprisonment for debt applies to criminal proceedings where the criminal statute declares the nonpayment of an obligation to be a crime. The validity of such a statute is dependent upon whether the legislative objective is consistent with such a constitutional guarantee. The power to prescribe punishment in a criminal case may not be used to defeat constitutional guarantees against imprisonment for debt. Such constitutional guarantees cannot be circumvented by indirection. Thus, the legislature has no power to declare the mere nonperformance of a contract of indebtedness a misdemeanor and to punish the commission thereof by imprisonment directly or indirectly; such a provision cannot be evaded by the device of declaring, in a municipal ordinance or statute, a simple breach of contract to be a crime. A statute providing a fine for the failure to pay wages in cash violates the constitutional provision against imprisonment for debt, if failure to pay the fine will result in imprisonment.

On the other hand, the constitutional provision prohibiting imprisonment for debt is not violated where the legislative purpose is to punish for an act declared criminal, not to enforce imprisonment for debt. Imprisonment after breach of a condition of probation that the defendant make restitution is not imprisonment for debt.

629 What are "debts"

In the consideration of the question of the constitutionality of an imprisonment for debt, the question arises as to what are debts within the meaning of the constitutional provision. There seems to be very little conflict among the authorities, which almost unanimously hold that the debt intended to be covered by the constitution must be a debt arising exclusively from a personal contractual obligation, express or implied, and judgments rendered thereon.

Observation: In some cases, the impossibility of paying for an item contracted for, coupled with the impossibility of returning it to the contractor, may result in a conclusion that imprisoning the contractee for failure to obey a court order to return the consideration for the contract, may result in imprisoning the contractee for debt. Thus, imprisonment of a party, who was ordered by a replevin judgment to return a vehicle or be liable for its value, amounted to unconstitutional imprisonment for failure to pay a debt where there was no factual dispute that the party could not have complied with the replevin judgment by returning the car, and therefore a finding of contempt and subsequent sentence could only have been based on his failure to pay the value of the car.

It has been stated that the word "debt" is of large import, including not only debts of record, judgments, and debts of specialty, but also obligations under simple contract to a very wide extent. However, a judgment is not necessarily to be treated as a debt; the origin and character of the claim is to be considered. If the claim was for debt, the clause applies. Provisions abolishing imprisonment for debt are frequently held not to apply to obligations to pay taxes, or to license fees upon occupations, privileges, and similar activities regulations enforced by fine and imprisonment. It is generally held, however, that a person cannot be imprisoned through the failure to pay an inspection fee by making such failure to pay an offense. Similarly, it has been held that an obligation placed by a municipal code on landowners to pay a fee or charge for garbage and waste collection and disposal is not a tax, but a charge imposed for a special service performed to the owner by the county, and thus constitutes a debt within the state's constitutional prohibition against imprisonment for debt; however, there is contrary authority. Automobile financial responsibility laws have been held not to violate

constitutional prohibitions of imprisonment for debt. "Debt," as used in a state constitutional inhibition against imprisonment for debt, does not include provisions within a marital separation agreement relating to a division of marital property for purposes of enforcement of the terms of the agreement. And an agreement which produces a security interest under the Uniform Commercial Code does not create a "debt" within the meaning of a state constitutional prohibition against any person being imprisoned for debt except in cases of fraud. A consent order, entered to enforce the Interstate Land Sales Full Disclosure Act, under which owners of family corporations were permanently enjoined from engaging in activities considered unlawful and were required to make payments to purchasers who had lost their property upon foreclosure, was not a "money judgment" or "debt" within the meaning of the federal statutory prohibition against imprisonment for debt.

630 Damages arising out of torts

It is generally held that the term "debt," in the context of a constitutional prohibition against imprisonment for debt, does not include damages arising from torts. Thus, the right to imprison a judgment debtor in an action based upon a tort exists, even though it may be contended that the judgment for damages recovered in such an action constitutes a debt owing by the defendant to the plaintiff. Under this rule, defendants in tort actions have been imprisoned without violation of the constitution in actions involving many varieties of tort, including --

-- libel.

-- assault and battery.

-- environmental torts.

-- trespass.

-- replevin.

-- trover and conversion.

Moreover, a constitutional provision that no person shall be imprisoned for debt does not inhibit punishment for tortious acts, although committed in the procurement of contracts under which the defrauded party suffers loss.

631 Obligations arising out of marital or similar relations; child support

Although there is authority to the contrary, it has been held that obligations arising from court orders entered in the course of divorce or similar proceedings, requiring the payment of temporary or permanent alimony, attorneys' fees, or suit money, are not debts for the purposes of a constitutional provision against imprisonment for debt, and so may be enforced by imprisonment for contempt of court. Authority is also divided on this issue with respect to obligations created by court orders for the support of children entered in the course of divorce proceedings, and obligations created by a property settlement. Imprisonment for desertion and nonsupport of a wife or child has been held not to violate the constitutional guarantee against imprisonment for debt.

632 Debts arising from crimes; criminal fines or penalties

The imprisonment of one who has committed a crime which creates or involves a debt, such as intentionally issuing a bad check, fraud, knowingly obtaining the property of another by deception with intent to deprive the owner thereof, or theft of another's property, does not violate a state constitutional provision barring imprisonment for debt. A sentence of confinement for failure to collect and remit taxes that one is obligated by law to collect is the result of a penal violation of a statute and does not constitute imprisonment for debt. Nor does requiring as a condition of probation that a defendant repay loans he obtained from pawnbrokers using stolen silver as collateral directly, since this condition relates to the criminal offense for which the defendant was convicted and does not violate the constitutional provision prohibiting imprisonment for debt. And denying a prisoner bail while his appeal is pending on the theory that the prisoner's financial condition poses a risk of flight does not violate the state constitutional article prohibiting imprisonment for debt in a civil action, since the prisoner had been imprisoned for conviction of criminal acts, and the constitutional article is thus not applicable.

Fines or penalties arising from a violation of the penal laws of a state, or of city or village ordinances, are not debts within the meaning of a constitutional provision prohibiting imprisonment for debt. Hence, imprisonment for the failure to pay a fine or other assessment is not an unconstitutional imprisonment for debt.

Practice guide: Before an indigent defendant may be incarcerated for failure to pay a fine, costs, or restitution, it must be shown that the defendant has willfully refused to make such payment or has failed to make a sufficient bona fide effort to legally acquire the resources to pay; and, if the indigent defendant cannot make such payments despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment

adequate to meet the state's interests in punishment and deterrence, such as community service. Robbins v. Labor Transp. Corp., 599 F. Supp. 705 (N.D. Ill. 1984); City of Wichita v. Lucero, 255 Kan. 437, 874 P.2d 1144 (1994).

633 Enforcement of court decrees or orders; contempt proceedings

The constitutional inhibition against imprisonment for debt has often been sought to be applied to proceedings which are the method of enforcement of a decree of an equity court. It is generally held that a punishment of contempt of court by such an equity court for the violation of a decree does not constitute imprisonment for debt within the meaning of the constitutional inhibition. It is true that a contractual obligation to pay money cannot be enforced by a court's contempt power because of the constitutional prohibition against imprisonment for debt. However, imprisonment for contempt of court of one who is able to pay a lawful debt and who has been ordered by the court to do so, but who simply refuses to do so, is not imprisonment for debt.

With respect to the constitutionality of a statute authorizing the imprisonment of a judgment debtor for the nonpayment of attorney's fees and costs in a civil action, the question seems to depend upon whether the action arises from a contract, express or implied, or from a tort. In cases of contract, the courts generally hold that the costs are debts so as to prevent imprisonment for their nonpayment, on the ground that the costs are merely a part of, and incident to, the debt. In cases of torts, however, the weight of authority is that the costs are not debts so as to prevent imprisonment for their nonpayment. Statutes authorizing imprisonment for nonpayment of costs in criminal proceedings have generally been upheld on the basis that such costs are not debts within the meaning of the constitutional prohibition against imprisonment for debt.

634 Generally

The Constitution of the United States provides that the United States shall guarantee to every state a republican form of government. It seems that proof of compliance with the guarantee is automatically furnished, with respect to a state entering the union, by the action of Congress in admitting the new state. After a state has been admitted to the Union, the effect of this guarantee appears to be to prohibit the state from exchanging its republican constitution for an antirepublican constitution. The constitutional provision that the United States shall guarantee to every state a republican form of government has been said to express the full limit of national control over the internal affairs of a state, for normally a state's internal affairs are matters of its own discretion, subject only to the limitations prescribed by the Constitution.

While the Supreme Court, in an early case, stated that the word "state," as it is used in the clause of the Federal Constitution guaranteeing to each state a republican form of government, refers to a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution and established by the consent of the governed, it is clear that this guarantee does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. The forms of local government in this country have been most varied, running all the way from the pure democracy of the town meeting form of government up to such absolute control by the legislature of the state that communities have been deprived of any voice in their local affairs. In view of these facts, the opinion has been expressed that the constitutional guarantee was intended to apply only to the form of government for the state at large, and not at all to the local government prescribed by the state for its municipalities and other subdivisions. Thus, the commission form of local government does not violate the federal constitutional provision. Similarly, the city-manager form of government is valid. A constitutional amendment consolidating a city and county government into one and authorizing the people to adopt a charter for their government and to amend such charter and to provide for the election or appointment of municipal officers is not invalid as exempting a portion of the state from the provisions of the constitution and general laws. But it has been held that a state cannot grant to a municipality within its boundaries absolute rights and prerogatives beyond recall, since to do so would be to permit the creation of a state within a state.

The Supreme Court has recognized that the Guarantee Clause is a restraint upon the political institutions and processes of the states. "The guarantee necessarily implies a duty on the part of the States themselves to provide such a government," said the Court in 1875.

635 What is a republican form of government; generally

Since the Constitution of the United States did not attempt to define the essential elements of a republican form of government, it is customary to refer to the forms of government of the original states as approved criteria; it is universally recognized that there was nothing in any of the forms of government prevailing in the original 13 states at the time of the adoption of the Constitution which was not consistent with a republican form of government.

A republican form of government as guaranteed by the Constitution of the United States has been defined as one which derives all its powers directly or indirectly from the people and which is administered by persons holding their offices for a limited period or during good behavior. This phrase connotes a government by the people through representatives appointed by them, either by direct vote or through some intervening officer or body selected by them and appointed by direct vote for that purpose.

636 Characteristics of republican form

Certain attributes have been described as characteristic of a republican form of government, and as not characteristic of an antirepublican government. In a republican form of government, the governor or president has only a delegated power and a limited sphere of action. In a republic, the tenure of office may be for a short or a long period, or even for life; yet those in office are at all times answerable, either directly or indirectly, to the people, and the power to enact laws and control public servants lies with the great body of the people. From this it follows that each republic may differ in its political system or in the political machinery by which it moves, but so long as the ultimate control of its officials and affairs of state remains in its citizens, it will, in the eyes of all republics, be recognized as a government of the republican type. No government is republican in form which fails to secure the purity of elections, and the principle of majority rule is at the foundation of republican systems of government.

The right of every citizen of the United States to follow any lawful calling, business, or profession he or she may choose, subject only to such restrictions as are imposed on all persons of like age, sex, and condition, is in many respects considered to be a distinguishing feature of the republican institutions of this country. Due protection of the rights of property has in similar manner been regarded as a vital principle of republican institutions, and every republican government is duty bound to protect all its citizens in the enjoyment of the equality of rights.

637 Characteristics of antirepublican form

Comparatively few attempts have been made to define an antirepublican form of government; yet it has been said that if a state should attempt to surrender its powers to an executive for life, with a provision that on his death that authority should pass by inheritance to his son, the form of government would no longer be republican.

638 Violation of guarantee in particular situations

From time to time, questions have been raised as to whether particular constitutional provisions or governmental institutions fulfill the requirement of a republican form of government. The legislative creation and alteration of municipal corporations, school districts, or drainage districts, and legislative regulations of the judicial system, such as those requiring counties to pay additional salaries of judges, have all been determined to be consistent with a republican form of government. Statutory provisions for the recall of public officers are also not obnoxious to a republican form of government. A state legislature's proposed constitutional amendment allowing the legislature to provide by a general law for forest fire protection in counties, to define what constitutes "forest lands," and to provide for the manner of levying and collecting assessments and the administration of those assessments does not, on its face, violate the republican form of government guarantee, even though the voters in some counties have already voted to impose the levy within their counties. Proceedings under the Clean Air Act, authorizing the Environmental Protection Agency to enforce a regulation which requires a state to withhold registration from vehicles that do not comply with applicable pollution standards and procedures, do not violate the constitutional guarantee to each state of a republican form of government. An amendment to a state constitution, providing that the legislature cannot enact special or local legislation affecting a certain county in the state without the approval of the electors of that county, does not conflict with the Federal Constitution's guarantee of a republican form of government.

A statute reorganizing the executive branch of the state government has been held not to be violative of fundamental principles of a republican form of government. The establishment of commissions to adjust the compensation to be awarded injured workers, under a system of industrial insurance, without resort to the courts, is also valid under this clause. Application of a section of a state law shifting the burden of proof to an oil and gas lessee to establish compliance with the implied covenant to explore and develop the land to pending litigation did not violate that section of the United States Constitution guaranteeing each state a republican form of government.

A statute providing for the purchase of school books for free distribution does not deny a republican form of government. A federal statute that pre-empts state regulation of intrastate motor carrier activities does not violate the Guarantee Clause, as the statute is a substantive constraint on the power of state governments to regulate intrastate trucking, not a fundamental restructuring of the form of state governments. And it cannot be contended that the establishment of a state liquor monopoly is tantamount to the creation of a communistic form of government.

On the other hand, taxation for a private purpose is prohibited by the clause of the United States Constitution that guarantees to every state a republican form of government, since such a form of government forbids the raising of taxes for anything but a public purpose. A state would be in violation of the Guarantee Clause if it permitted private armed forces in the community. Also, the legislature has no power to declare that county recorders elected for a term of two years shall hold office for four years, since a republican form of government rests on the right to select public officers for terms fixed in advance.

A claim that a state statute constitutes arbitrary and capricious state action in its irrational disregard of the standard of apportionment prescribed by the constitution of a state, or of any standard, effecting a gross disproportion of representation to voting population, has been held neither to rest upon nor to implicate the clause in Article IV, ß 4, of the United States Constitution, providing that the United States shall guarantee to every state a republican form of government.

A state's claim for reimbursement against the United States for the expenses it had incurred coping with a "flood" of undocumented aliens resulting from the failure of the national government to enforce its immigration and naturalization policies was held not to present a justiciable claim for violation of the republican form of Guarantee Clause of the United States Constitution, inasmuch as the state suggested no manageable standards by which the court could decide the type and degree of immigration law enforcement that would suffice to comply with the strictures of Guarantee Clause.

Observation: The constitutional guarantee of a republican form of government in every state applies to states only and does not restrict the power of Congress to legislate for the District of Columbia.

639 Blending of powers of departments of government

The doctrine of separation of powers is an inherent and integral element of the republican form of government and is expressly guaranteed to the states by the Federal Constitution. Combining incompatible functions in one governmental agency, or allowing one division to usurp powers expressly delegated to another is generally deemed offensive to federal constitutional order, whether the separation-of-powers doctrine is explicitly mandated by the text of the United States Constitution or is merely recognized as implicit in its provisions. Nevertheless, the guarantee of a republican form of government is not violated when a single state officer is vested with powers which represent the blending of powers of different departments of the government. A state is not forbidden under the Federal Constitution from providing for administrative revocation of a defendant's court-ordered probation on the basis of the doctrine of separation of powers. And there is no express constitutional provision requiring that the doctrine of separation of powers be applied to the states.

640 Initiative and referendum

The generally accepted view is that the system of direct legislation which has been in common use throughout the various state governments since their inception is clearly consistent with a republican form of government, even though it may deprive a state legislature of some lawmaking power or powers held by it at the adoption of the Federal Constitution. Accordingly, it has been held that such direct powers of legislation may be exercised by the people through the initiative and referendum, either on the state or local level.

Practice guide: It has been said that a challenge under the Guarantee Clause to legislation adopted by the initiative process is not to be undertaken lightly, especially in a state where the initiative process has long been sustained by the courts. Such a challenge would require extensive briefing of the origins, history, and political theory underlying the Guarantee Clause and how they might bear on the statute at issue. Where such analysis is not undertaken, the challenge will not succeed.

Observation: It has also been held that whether adoption of the initiative and referendum is a violation of the guarantee of a republican form of government is a political question to be determined by Congress and not by the courts.

641 Determination whether form is republican as political question

Whether a state has a republican form of government under Article IV, ß 4 of the Federal Constitution has been held to be a political and not a judicial question, and therefore to be determined not by the courts, but by the political department of the Federal Government, that is, by the Congress. Under this view, the decision of Congress is binding on every other department and cannot be questioned in any judicial tribunal. The republican form of democratic government requires that the judiciary refrain from disrupting the elaborate checks and balances which regulate how and by whom decisions are made at local, county, and state levels of government. Thus, the United States Supreme Court has rejected, as nonjusticiable, claims under this clause that a state's resolution of a contested gubernatorial election deprived voters of a republican government, or that any of the following negated a republican form of government:

.the initiative and referendum process;

.a municipal charter amendment by municipal initiative and referendum;

.a state's constitutional amendment procedure;

.delegation to a court of power to form drainage districts;

.invalidation of a state reapportionment statute by referendum;

.a workers' compensation law;

.a state constitutional provision stating that a state statute cannot be held unconstitutional by the state supreme court except by a concurrence of least all the members of that court but one; or

.delegation to an agency of power to control milk prices.

Observation: Notwithstanding the foregoing, it is clear that some courts have regarded Guarantee Clause issues as within their powers of adjudication and have ruled on such issues when called upon to do so. The Supreme Court has employed language in one decision suggesting that the rule against judicial adjudication of Guarantee Clause issues may not be absolute, but merely a facet of the general rule against adjudication of political questions. Furthermore, it has been said that while claims under the Guarantee Clause do not present justiciable controversies in federal court, this does not mean that a state court may not rule upon the compatibility of a state law with the Guarantee Clause.

642 Protection of states against invasion and domestic violence

Article IV, ß 4 of the United States Constitution not only provides that the United States shall guarantee to every state a republican form of government, but also that the United States shall protect each of them against invasion and, on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence. Referring to the latter portion of the provision, the Supreme Court long ago stated that it rested with Congress to determine upon the means proper to be adopted to fulfill this guarantee. Thus, it has been recognized that Congress has the duty of suppressing sedition within a state under its obligation to guarantee to every state a republican form of government. Congress has exercised its constitutional power flowing from the foregoing section and from the "necessary and proper" clause of Article I, and has in a number of statutes empowered the President to use national forces to put down domestic violence in the states.

Not only can the Congress and the President employ force to suppress domestic violence within the states, but the federal courts also can use their process and federal marshals to protect citizens in their federal rights from mobs and other forms of domestic violence. And since the people of a state have guaranteed to the people of the United States to maintain a republican form of government, they not only have the right to protect themselves and their chosen form of government from attack from any source, but it is their duty to do so.

Observation: Like the Guarantee Clause, the clause providing for protection against invasion has been found to give rise to claims that are nonjusticiable political questions. A state presents a nonjusticiable political question when it claims that the United States violates the Invasion Clause by failing to stop the intrusion of illegal immigrants, where the political branches of United States have not determined that an "invasion" has actually occurred. This is because "[i]n order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state's government."

643 Constitutional prohibition, generally

The Constitution of the United States prohibits the enactment of ex post facto laws by Congress, and the Supreme Court has held that this prohibition cannot be contravened merely because Congress concludes that a particular measure is authorized by Article I, ß 8, clause 18, as being "necessary and proper" to the discharge of its substantive legislative authority. The Court has also noted that the Constitution's ex post facto prohibitions uphold the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law. Unlike the Fourth Amendment, the scope of the Ex Post Facto Clause is not defined in terms of reasonableness; the ex post facto prohibition is absolute. Through the ex post facto prohibition, the framers of the Constitution sought to assure that legislative acts would give fair warning of their effect so as to permit individuals to rely on their meaning until explicitly changed. The constitutional prohibition against ex post facto criminal sanctions requires, as a general rule, that criminal proceedings be governed by the statutory provision in effect at the time of the offense. Where a new legislative act applies only to conduct occurring after its enactment, it cannot be styled as an ex post facto law. Thus, the Ex Post Facto Clause is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. The constitutional prohibition against ex post facto laws cannot be avoided merely by adding to a law a notice that it might be changed. A law need not impair a vested right to violate the ex post facto prohibition.

The constitutional restriction on the power of Congress to pass ex post facto laws also is applicable generally to the power of Congress to legislate for territories of the United States. The United States Constitution contains a similar prohibition against enactment of ex post facto laws by the states. Additionally, many state constitutions include a provision prohibiting the enactment of such laws, but other state constitutions do not.

Observation: A defendant may elect to have a subsequently enacted law applied to him or her, and if the defendant does so, he or she cannot claim a constitutional violation.

The ban against enactment of ex post facto laws also embraces local charters and ordinances, and regulations or orders of any instrumentality of the state exercising delegated legislative authority.

The right of protection against the passage of ex post facto laws guaranteed to citizens by the Constitution has no relation to crimes committed outside the jurisdiction of the United States and against the laws of a foreign country.

644 Definition of ex post facto law

The Supreme Court of the United States at different times has enunciated varying definitions of the phrase "ex post facto law." The early and classic definition was as follows: "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." This definition has been quoted, referred to, paraphrased, and followed in many cases.

Observation: The date of commission of the underlying crime, and not the date of the filing of a bill of information charging the defendant, is the appropriate date for consideration in determining whether a law applies to a defendant.

The early definition, as set up by the Supreme Court, was modified to some extent by later decisions which defined an ex post facto law as one which, in its operation, "makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his detriment or disadvantage." But not every law which merely disadvantages a defendant retrospectively is an ex post facto law. More recently, the Supreme Court has said that a law violates the Ex Post Facto Clause only if it: punishes as a crime an act previously committed, which was innocent when done; makes more burdensome the punishment for a crime after its commission; or deprives one charged with a crime of any defense available under the law in effect when the act was committed. This decision has shifted the emphasis away from examining whether a defendant has been "disadvantaged" back to the original concept of an ex post facto law as being one which increases the punishment for a criminal act after it has been committed. In any event, the ex post facto ban restricts governmental power by restraining arbitrary potentially vindictive legislation, and upholds the separation of powers by confining the legislature to penal decisions with prospective effects and the judiciary's and executive's applications of existing law.

Practice guide: Two critical elements must be present for a criminal or penal law to be ex post facto: (1) it must be retrospective, i.e., it must apply to events occurring before its enactment; and (2) it must disadvantage the offender affected by it, which occurs if it punishes an act not punishable when committed. One court has also said that in order to determine whether a government measure constitutes punishment for purposes of applying the constitutional prohibition against ex post facto laws, one must analyze the totality of circumstances by grouping them in four areas: intent, design, history, and effects.

A statute is not considered punitive for purposes of the Ex Post Facto Clause, even though it may also have a punitive purpose and even if it disadvantages the person affected by it, where it has primarily a legitimate regulatory purpose.

645 Distinguished from retrospective or retroactive laws

Ex post facto laws and retrospective or retroactive laws are easily distinguished. Every ex post facto law must necessarily be retrospective, but not every retrospective law is an ex post facto law. Ex post facto laws relate to crimes and criminal statutes only.

646 Limitation of prohibition to legislation relating to crimes and penalties

The phrase "ex post facto" is said to be one which relates exclusively to criminal or penal statutes, whereas retrospective laws may relate to civil as well as to criminal matters. Therefore, the imposition of civil fines and the assertion of civil jurisdiction do not violate the constitutional prohibition against ex post facto laws. The United States Constitution also limits the powers of the states with regard to the imposition of criminal punishment.

Observation: A distinction should be made, for ex post facto purposes, between a retrospective law, which looks to the past to inform the present, and a retroactive law, which acts presently to change the past.

In many instances, assertions that particular legislation was invalid as contravening the constitutional prohibition of ex post facto laws have been rejected on the ground that the legislation in question was not penal in character and thus fell outside the ambit of the ex post facto prohibition. In determining whether a law subjects an individual to punishment for purposes of an ex post facto analysis, a court inquires not only whether the legislative intent was punitive in nature, but whether the challenged civil provision is so extreme as to constitute punishment. Thus, since commitment of persons acquitted of a crime by reason of insanity is imposed, not as punishment, but for the protection of society and of the individual confined, a law so providing is not ex post facto as applied to a case in which the act charged as a crime was committed before the commitment statute was passed. Similarly, statutes providing for confinement of sexual psychopaths are not criminal statutes, and therefore do not violate the prohibition against ex post facto laws. For the same reason, the ex post facto prohibition is inapplicable to laws providing for the deportation or denaturalization of aliens, or for the expatriation of citizens. And state tax laws which impose no penalty or punishment of a criminal nature are not ex post facto laws even though retroactive in operation. Statutes directed to the curing or validation of defective acknowledgments or to the validation of instruments which lack a required acknowledgment are not objectionable even though they are made to operate retrospectively, since the prohibition against ex post facto laws extends only to acts relating to crimes and punishments. An act of the legislature failing to appropriate money for the payment of the salary of a state employee is not an ex post facto law. And a liquor prohibition law is not invalid as ex post facto legislation merely because it prohibits the sale of liquor in existence at the time of its adoption, it being held that the civil consequence of lessening the value of the liquors does not make the law retroact criminally in such sense as to bring it within the constitutional prohibition. However, the impact of the Ex Post Facto Clause may not be avoided by placing criminal penalties in the disguise of civil form.

Practice guide: The first step in determining whether a statute is punitive or regulatory, for ex post facto purposes, is to review the legislature's intent in creating the measure, and, if such intent is clearly punitive, then no further inquiry is required; the mere fact that the statute's intent is regulatory, however, does not end the inquiry, since a court must undertake an historical and functional analysis to determine if the statute's effect is in fact punitive. In determining whether a sanction is punitive or regulatory for ex post facto purposes, a court considers whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment such as retribution and deterrence, whether the behavior to which it applies is already a crime, whether any alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned.

647 Applicability to judicial decisions or court rules

Although originally an examination of whether an ex post facto law violated the Federal Constitution applied only to laws passed by the legislature, such is no longer the case in many jurisdictions, which subscribe to the view that an ex post facto doctrine prohibiting the retroactive application of laws does apply to the judicial construction of laws, including both unforeseen constructions as well as clarifications of existing laws. This was made clear by the United States Supreme Court, when it said that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Article I, ß 10, of the [United States] Constitution forbids," and that since "a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Thus, the majority of courts now hold that the state and federal ex post facto prohibition barring statutes that increase the punishment for unlawful acts after they were committed applies equally to judicial decisions, whose effect is also to increase punishment for criminal conduct after its commission. The ex post facto clauses of the state and federal constitutions are generally held inapplicable to mere changes in court rules.

A slightly different view holds that, while the Ex Post Facto Clause technically is a limitation upon the powers of the legislature, and does not of its own force apply to the judicial branch, the principle on which the clause is based -- the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties -- is fundamental to our concept of constitutional liberty and as such, is protected against judicial action by the Due Process Clause of the Fifth Amendment. The overruling of governing case law and a return to prior instructions for "acting in concert" has been held not to act as an ex post facto law, where the decision in the case which was subsequently overruled was not certified until after the defendants were sentenced, so that the prior law still governed their case.

648 Amendment, repeal, or re-enactment of statute as effecting alteration

The principles governing ex post facto laws have an extensive application to that class of cases in which, after the commission of an offense but before trial, a penal statute is amended or repealed and a new statute or a new version of the same statute is enacted. An act is not ex post facto as to prior crimes merely because it continues in force laws which existed when such crimes were committed and which would cease to be operative if not kept alive by such statute. Although an amendatory act is ordinarily applied prospectively only unless the statutory language clearly indicates otherwise, a firmly established exception to that rule is that an amendment which affects only procedural matters and not substantive rights is applied retroactively as well as prospectively. If an act is criminal and punishable when committed and a statute is subsequently enacted also making it criminal and punishable, but giving the crime a designation not before given to it, the situation of the accused is not altered to his or her disadvantage and, accordingly, such statute is not an ex post facto law. When the same offense is defined in the same way by both the earlier and the later statute, the courts refuse to recognize that there is any interval in which there was no law defining the offense. Similarly, an amendment which merely changes the name of a statute providing criminal sanctions for defrauding a specified government agency whose name was changed does not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict greater punishment than the law annexed to such crime at the time of its commission, nor alter legal rules of evidence in order to convict an offender; thus, prosecution for violation of the statute is not precluded on the theory that the change of name gave an ex post facto effect to act. A state statutory amendment providing that an accessory before the fact to a felony is to be indicted, tried, and punished as a principal is not an ex post facto law. A statute which permits a prison inmate to serve part of his or her sentence on supervised release rather than entirely in prison is not an ex post facto law. And a statutory amendment permitting the United States to intervene in an informer's suit and carry on the suit does not deprive the informer, who had instituted the suit prior to enactment of such amendment, of any rights under the Constitution.

On the other hand, the situation occasionally arises that the offender cannot be punished under the old law because it has been repealed or altered, or because, under the amended law as to him or her, it is an ex post facto law. Thus, where a change in a penal statute is made after the commission of an offense and before trial, by means of which the crime is so defined as to make criminal something which was before lawful, it has been held that the offender cannot be punished under either statute. Similarly, retroactive application of a statutory amendment replacing judicial discretion with a mandatory requirement for admission of evidence, if offered, of prior convictions for the purpose of impeaching the credibility of a witness, to a defendant testifying in a prosecution for a crime committed prior to the effective date of such amendment, would violate the constitutional prohibition against ex post facto laws. And an instruction, pursuant to an amended statute, that the defendant had the burden of establishing an insanity defense by a preponderance of the evidence violates the Ex Post Facto Clause of the Constitution, where the rule in existence at the time the defendant committed the offense charged placed upon the prosecution the burden in criminal cases of proving criminal responsibility beyond a reasonable doubt once the defendant had raised the insanity defense.

649 Legislation affecting punishment; initiation of punishment for previously innocent conduct

Among the types of retroactively applied changes in the law which the courts have recognized as being violative of the ex post facto clauses are changes which impose or initiate punishment for an act which was innocent when committed. In determining whether legislation unconstitutionally imposes a punishment for past conduct, the governing inquiry is whether the legislative aim was to punish an individual for past activity, or whether a restriction of the individual comes about as a relevant incident to a regulation of a present situation. Thus, a law cannot be said to be ex post facto which provides punishment or a penalty for the continued maintenance of certain conditions which, prior to the enactment of the statute, were lawful. A general law for the punishment of offenses, which endeavors to reach, by its retroactive operation, acts previously committed, as well as to prescribe a rule for the future, is void insofar as it is retrospective, but such invalidity will not affect its operation in regard to future cases. Laws which would be ex post facto if operating retrospectively will, if possible, be construed prospectively only. However, even though the governing criteria may be readily stated, each case turns on its own highly particularized context. A court will look at the substance of the law and not at its form in determining whether it is ex post facto.

Statutes making incest an offense cannot operate retroactively, or they would be ex post facto. On the other hand, enactments which allegedly operate to prevent a person from practicing his or her chosen calling have been held not to fall within the definition of an ex post facto law for purposes of the Federal Constitution in some cases. The removal or discharge of municipal or county officers or employees, either under or apart from constitutional or statutory provisions, for refusing to answer relevant questions put to them by authorized bodies or individuals has been sustained against the specific constitutional objection that it amounted to an ex post facto law. And a statute establishing antitrust violations and imposing sanctions therefor has been held valid as against the contention that it constituted an ex post facto law in

violation of the United States Constitution, in that it supposedly rendered illegal and penalized continuing transactions or activities which were perfectly valid when begun prior to the enactment of the statute. A defendant's conviction for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) arising from an alleged scheme to defraud a casino does not violate the Ex Post Facto Clause to the extent that the underlying offenses occurred prior to a state's enactment of statutes that prohibited cheating at gambling games and marking or altering gaming equipment or devices, given any absence of showing that cheating at gambling was legal in the state prior to the statutes' enactment. A provision for forfeiture of military pensions or benefits upon a finding of guilt of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States has been held not unconstitutional as an ex post facto law, the prohibition being regarded by the court as merely the prescription of additional qualifications for eligibility to receive a gratuitous benefit. Although a husband or parent has deserted or abandoned his wife or child prior to the enactment of a statute punishing desertion or nonsupport of a wife or child, he can still be prosecuted for a failure to provide support for his wife or child occurring after the enactment of the statute; but where the offense charged is wife or child abandonment or desertion as distinguished from nonsupport, there can be no prosecution for an abandonment or desertion which took place before the enactment of the statute, because otherwise the statute would be invalid as ex post facto.

650 Aggravating degree of crime resulting from act

As a general proposition, legislation which aggravates the degree of the crime resulting from an act committed prior to its passage violates the constitutional prohibition against ex post facto laws. Thus, laws which increase the seriousness of criminal acts over that which obtained when the acts were committed are constitutionally infirm as being ex post facto. However, the federal capital sentencing scheme was held not to violate the Ex Post Facto Clause to the extent that the government was permitted to define nonstatutory aggravating factors after the crime occurred.

651 Continuing offenses; multiple offenses

In the case of continuing offenses, such as a conspiracy, the Ex Post Facto Clause is not violated by application of a new statute to an enterprise that began prior to, but continued after, the effective date of the statute. A "continuing offense," for ex post facto purposes, ordinarily is marked by a continuing duty in a defendant to do an act which he or she fails to do, and which continues as long as the duty persists, and there is a failure to perform that duty. When the law imposes an affirmative obligation to act, the violation is complete at the first instance the obligation to act is not met, but is not completed as long as the obligation remains unfulfilled, for ex post facto purposes. A law defining a continuing offense does not implicate ex post facto considerations because the law does not change the legal consequences of acts completed before its effective date, but operates solely with respect to subsequent conduct. A law is not an ex post facto law merely because it punishes a continuing offense which was not punishable when first committed, but which has continued after enactment of a statute making such continuing conduct unlawful. And while two alleged overt acts in a scheme to use the mails to defraud the public of the honest services of a government officer occurred before the effective date of a statute prohibiting use of the mails for such a purpose, where most of the defendants' criminal conduct occurred after that date, a conspiracy prosecution under the statute did not violate the Ex Post Facto Clause.

652 Legislation increasing punishment, generally

The Supreme Court and other federal and state courts have held that one class of invalid ex post facto laws consists of statutes which retroactively impose a punishment in addition to, or greater than, that prescribed by the previous law or which increase the severity of the manner of punishment.

Observation: Under the Ex Post Facto Clause, the retroactive enhancement of a penalty is just as onerous as the retroactive creation of a penalty.

Sentencing a defendant convicted of two counts of voluntary manslaughter under a new statute requiring the imposition of consecutive sentences violates the ex post facto prohibitions, where the former statute gave the trial court discretion to impose concurrent sentences at the time of the offenses.

Whether the standards of punishment set up before and after the commission of an offense differ, and whether the later statute is hence more onerous than the earlier so as to make its application to the offense a violation of the ex post facto clauses in the United States Constitution, have been declared federal questions on which the Supreme Court will not be bound by state decisions, and to answer such questions, the Court compares the practical operation of the two statutes as applied to the offense.

Observation: When a sentencing or disposition statute merely regulates the imposition of a sentence without increasing the level of punishment, a trial court may constitutionally apply the statute effective at the time of disposition, though it was not yet effective at the time of the offense.

653 Test for determining applicability of ex post facto prohibition of increases in punishment

In determining whether legislation increases the punishment for a prior offense in violation of the Constitution's prohibition against ex post facto laws, the key question is whether the new law makes it possible for the accused to receive a greater punishment, even though it is also possible for him or her to receive the same punishment under the new law as could have been imposed under the prior law. Thus, the Ex Post Facto Clause looks to the standard of punishment prescribed by a statute rather than to the sentence actually imposed as the true test of a state's ex post facto nature, and an increase in the possible penalty may be a violation of the clause regardless of the length of the sentence actually imposed. That determination does not depend upon its operation on a particular individual, but upon its effect on all prior wrongdoers of a particular class.

Caution: There is no mechanical formula for determining whether a new law sufficiently increases a punishment to be considered ex post facto; rather, the courts must determine on a case-by-case basis whether the change in the law produces a sufficient risk of greater punishment for covered crimes.

654 Capital punishment cases

Numerous courts have held that a change in the manner of execution of persons sentenced to death does not violate the ex post facto clauses. Thus, the application of new lethal injection regulations, governing the procedures for execution of federal offenders, to a defendant sentenced to death does not violate the Ex Post Facto Clause since any designation of a method for a defendant's execution would not increase the quantum of his or her punishment. And a state does not violate a petitioner's rights under the Ex Post Facto Clause by changing the place and procedures applicable to his or her execution. However, laws imposing or re-establishing the death penalty, where no such penalty existed at the time a particular crime was committed, clearly do violate the ex post facto clauses.

655 Confinement terms, methods, and conditions

Generally speaking, most legislative changes which have been challenged as allegedly adding to the punishment for a prior offense have been held not violative of the ex post facto prohibition. These changes have included those --

-- imposing more burdensome conditions of confinement.

-- imposing solitary confinement.

-- removing a prisoner from a work release program and reinstating confinement.

-- allowing the transfer of prisoners to another prison.

-- providing for concurrent, rather than separate and cumulative, sentences.

-- changing the rules for awarding "good time" allowances in prison.

-- regulating prison discipline.

-- subjecting certain prisoners to AIDS testing.

-- requiring prisoners to make a copayment to receive medical care.

-- requiring prisoners to pay a monthly fee for administration of their trust accounts.

-- requiring each sentenced offender on probation to pay a modest civil fee to "reimburse" the department of corrections for costs associated with providing goods and services to supervised probationers in the community.

-- permitting the state to recoup fees for court-appointed counsel and expenses incurred in producing a verbatim report of proceedings and the clerk's papers.

-- requiring an inmate to reimburse the state for the cost of his or her incarceration.

-- increasing the amount of a bond which is required for a suspension of sentence.

-- imposing deportation.

-- imposing disfranchisement.

-- disqualifying a person from holding public office or practicing a calling.

In short, the Supreme Court has said that the Ex Post Facto Clause does not forbid all legislative changes that have any conceivable risk of affecting a prisoner's punishment. Nonetheless, changes in the law providing for indeterminate sentences may violate the ex post facto clauses, and imposing newly enacted restitution requirements after a crime has been committed usually are viewed as ex post facto violations.

656 Recidivist statutes; "three strikes" laws; enhanced punishment laws

Recidivist statutes do not violate the Ex Post Facto Clause by taking into account prestatute offenses in determining punishment. In general, sentence enhancement statutes withstand constitutional attacks under the Ex Post Facto Clause, because such statutes do not punish a defendant for his or her prior convictions, but instead punish the defendant as a repeat offender for the latest offense on the basis of his or her demonstrated propensity for misconduct. Thus, the passage by Congress or a state legislature of recidivist statutes, so-called "three strikes" laws, or statutes that provide for enhanced punishment for multiple repeat offenses following the commission of an initial or subsequent criminal act, but prior to the commission of the final criminal act subjecting a defendant to an enhanced sentence, is generally held not to be a violation of the Ex Post Facto Clause.

For the purpose of analyzing ex post facto implications of repeat offender statutes and statutes increasing penalties for future crimes based on past crimes, the relevant offense is the current crime, not the predicate crime. A statute which prohibits specified future conduct and puts a defendant on notice of the consequences of his or her contemplated act does not become an ex post facto law simply because liability is based on a previous conviction. Thus, sentencing enhancement provisions under which a recidivist sentence on a kidnapping charge was imposed did not constitute ex post facto laws; despite a claim that when the defendant committed the prior offenses, he could not have known that the legislature would subsequently enact enhancement statutes, thereby preventing him from conforming his conduct accordingly. And an aggravated felony enhancement of an illegal re-entry defendant's sentence did not violate the Ex Post Facto Clause of the United States Constitution, even though the felony relied upon for enhancement occurred before its effective date, where the defendant re-entered the country after the enhancement was in effect, because the relevant event was not the crime of drug trafficking, but his illegal re-entry. In many states, convictions of the defendant committed while he or she was a juvenile may be used to support the application of recidivist statutes to the defendant's commission of crimes he or she committed as an adult offender.

A statute prohibiting the aggravated unlicensed operation of a motor vehicle in the first degree was not an unconstitutional ex post facto statute as applied to a defendant who operated a vehicle with a blood alcohol level greater than.10 percent during a period of prior license revocation; the statute's enactment provided the defendant with a fair warning that, upon commission of an alcohol-related vehicular offense, he would be subjected to enhanced criminal liability as a result of the continued revocation of his driver's license. A statutory amendment pursuant to which prior offenses within a 10-year period, rather than the former six-year period, were looked to determine the applicability of more severe penalties for operating a motor vehicle while under the influence of intoxicants did not violate the ex post facto clauses of the state or federal constitutions as applied to a motorist whose offense was committed after the effective date of the amendment; the amendment operated prospectively to define the penalties for repeat offenses committed after the date of the statute and did not increase the penalties for prior offenses. However, the application of an amendment to a multiple offender statute, which extended the "cleansing period" under the statute for prior offenses from five to seven years, to a defendant whose underlying crime was committed before the amendment's effective date did violate the Ex Post Facto Clause, since the amendment as applied to the defendant related entirely to his past conduct rather than to his future conduct, and altered the situation of the defendant to his disadvantage.

657 Sex offender legislation

Community notification requirements imposed on sex offenders who are being released from prison and who are moving to a particular community under provisions of state statutes, frequently referred to as "Megan's laws," that require public notification to the community where the sex offender intends to live do not inflict retroactive "punishment" in violation of the Ex Post Facto Clause, although there is some dissent from this view. These laws are generally viewed as regulatory or civil in nature, not penal. Such laws may also be made to apply to juvenile sex offenders.

Practice guide: A useful analytical tool for determining whether sex offender registration and community notification provisions of a "Megan's law" is punitive for purposes of ex post facto clauses is to consider the intent of the legislature, the practical effect of the legislation, the purpose of the statute, and analogous historical precedents.

Other sex offender laws may require registration with the local police if the offender moves into a particular locality, but do not require community-wide public notification. These types of statutes are generally regarded as nonpunitive and not violative of the Ex Post Facto Clause. Prosecution of a defendant, a convicted sex offender, for failure to inform the police authorities of a change in residence does not violate the Ex Post Facto Clause, even though the statute which provides for the registration requirements was enacted after the defendant committed the original offense. This is so because a sex offender's failure to register his address is a continuing offense, and is a felony prosecution, based on the

offender's nonregistration after the effective date of a law making failure to register a felony rather than a misdemeanor. Thus, such a requirement does not violate the prohibition against ex post facto laws.

A state sexually violent predator act does not establish "criminal" proceedings, and the involuntary confinement pursuant thereto is not punitive, thus precluding a finding of any double jeopardy or ex post facto violation, where:

.the act creates a "civil" commitment procedure;

.commitment under the act does not implicate retribution or deterrence;

.the act requires no finding of scienter;

.immediate release is permitted upon a showing that the confined person is no longer dangerous or mentally impaired;

.use of the procedural safeguards traditionally followed in criminal trials does not render the proceedings criminal; and

.treatment, if possible, is at least an ancillary goal of the act.

For purposes of an ex post facto analysis, such laws do not have a retroactive or a punitive effect. Instead, they permit involuntary confinement for purposes of treatment, frequently in a mental hospital, based on a determination that the person currently both suffers from a mental abnormality or a personality disorder and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used solely for evidentiary purposes.

A statute requiring those convicted of sex offenses to provide a blood sample for a DNA profiling analysis does not violate the ex post facto clauses of the federal or state constitutions when applied to those convicted prior to the statute's effective date, inasmuch as the purpose of the statute is to identify those individuals that have a higher probability to commit crimes, not to punish individuals convicted of those crimes. Further, the submission of blood samples for a DNA profiling analysis does not constitute a "punishment," as is required to violate the ex post facto clauses, because the blood samples are used to further a legitimate governmental interest in law enforcement. And the retroactive application of an amendment to a state statute relating to sex offense prosecutions under which either an "outcry" by the victim within one year or the corroboration of the victim's testimony is required to support a conviction only when the victim is 18 years of age or older does not violate the Ex Post Facto Clause, inasmuch as the amendment constitutes a procedural change and does not require less evidence to sustain a conviction.

658 Changes and revisions in federal sentencing guidelines

A federal sentencing court should apply the United States Sentencing Guidelines in effect at the time of sentencing unless the court determines that such an application would violate the Ex Post Facto Clause by imposing a harsher sentence than could have been imposed under a prior version of the Guidelines. A sentence that is increased pursuant to an amendment to the Sentencing Guidelines effective after the offense was committed violates the Ex Post Facto Clause; but a change that works to a defendant's benefit by resulting in a sentence that is lower than it would have been under earlier Guidelines does not violate the Ex Post Facto Clause. Further, if a change in the Sentencing Guidelines does not amount to a substantive change in the law, but merely restates or clarifies an existing law, the change does not offend ex post facto concerns. Thus, where revised, more stringent Sentencing Guidelines are not merely procedural changes in the law, and their application to a defendant, whose crimes occurred before their effective date, violates the Ex Post Facto Clause. But an indictment alleging a conspiracy to commit bank fraud with three financial institutions, covering transactions that occurred prior to the effective date of the Sentencing Guidelines, did not violate the Ex Post Facto Clause, even though the Guidelines would allegedly impose a mandatory minimum sentence on conduct occurring before their effective date, since the conspiracy allegedly continued until well after the effective date of the Guidelines.

Observation: Revised sentencing guidelines were retrospective and their application to the defendant, whose crimes occurred before their effective date, violated the Ex Post Facto Clause, where, although the law provided for continuous review of the guidelines, it did not warn the defendant of the specific punishment prescribed for his crimes.

The use of juvenile adjudications in determining criminal history under a state sentencing guidelines act has been held not to violate the constitutional prohibition against ex post facto laws.

659 Mitigating or reducing punishment

It is settled that the ex post facto prohibition does not bar legislation effecting a change in the penalty for a crime where the change operates to ameliorate or mitigate, and not to aggravate, the penalty, it being axiomatic that for a law to be an

ex post facto measure, it must be more onerous than the prior law. Stated differently, the general rule is that a law is not within the constitutional prohibition where, instead of creating or aggravating the crime, increasing the punishment, or changing the rules of evidence for the purpose of conviction, it mitigates or mollifies the rigor of the law.

Statutes permitting lesser punishments or reducing the maximum sentence do not, of course, present ex post facto problems. And a statutory change which merely ameliorates the conditions of an inmate's confinement does not constitute an ex post facto law.

660 Legislation affecting defenses

The Supreme Court and other federal and state courts have held that legislation which eliminates, after the date of a criminal act, a defense available to the accused person at the time the act was committed violates the ex post facto provisions of the United States Constitution.

661 Legislation changing remedy or mode of procedure

It is firmly established that the prohibition as to the passage of ex post facto laws has no application to changes which relate exclusively to a remedy or mode of procedure. Even if a law operates to a defendant's detriment, the ex post facto prohibition does not restrict legislative control of remedies and modes of procedure which do not affect matters of substance; thus, no ex post facto violation occurs if a change in the law is merely procedural and neither increases the punishment nor changes the ingredients of the offense or the ultimate facts necessary to establish guilt.

A person has no vested right in any particular remedy and cannot insist on the application to the trial of his or her case, whether civil or criminal, of any other than the existing rules of procedure. The inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. Statutes making changes in the remedy or procedure are always within the discretion of the lawmaking power and are valid so long as they do not deprive the accused of any substantial right or conflict with specific and applicable provisions of the Federal Constitution, even though they may work to the disadvantage of the defendant. An amendment to a statute providing restitution payments to a victim, that payments shall be made to a restitution fund to the extent that the victim received governmental assistance, is declaratory of legislative intent, is purely procedural, is not a punishment, and would not cause prejudice to a defendant. Thus, retroactive application of the amendment does not violate the ex post facto prohibition, since the amendment merely directs to whom the restitution payments will be made without changing any substantive provisions of the law.

At the same time, although changes which may be designated as procedural do not, as a rule, come within the ex post facto doctrine, that in itself is not the true test. There may be procedural changes which operate to deny the accused a defense available under the laws in force at the time of the commission of his or her offense, or which otherwise affect the accused in such a harsh and arbitrary manner, as to fall within the constitutional prohibition.

The legislature does not immunize a law from scrutiny under the Ex Post Facto Clause simply by labeling it "procedural," since subtle ex post facto violations are no more permissible than overt ones. Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition against ex post facto laws cannot be embraced within a formula or stated in a general proposition, the distinction being one of degree. It has been stated, however, that the Constitutional prohibition was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.

662 Changes affecting indictments or grand juries

A statute changing the mode of procedure in criminal cases from indictment to information is not ex post facto as applied to offenses committed before its passage, and takes away no substantial right of an accused, although a few courts have taken the view that the adoption of a law authorizing the prosecution of crimes already committed by information instead of by indictment is forbidden by the Ex Post Facto Clause of the Constitution, on the theory that the right to an indictment is a substantial right of the accused. A statute setting forth what shall be a sufficient indictment is not ex post facto and invalid.

Laws are not ex post facto which, after the commission of an offense, allow amendments to pending indictments, thus preventing the defendant from taking advantage of variances in the indictment. And a statute permitting the consolidation into one indictment of charges of crimes of a similar nature or constituting parts of a common plan or scheme is not, as applied to crimes committed prior to its enactment, violative of the Ex Post Facto Clause of the Federal Constitu-

tion, nor is such a statute rendered ex post facto because there would have been more peremptory challenges available to the defendants had they been tried separately.

In the case of statutes effecting a change in the number of grand jurors, it is generally held that such a statute does not constitute ex post facto legislation when applied to offenses committed before its passage, although there is some authority to the contrary. A statute requiring grand jurors to be persons of good intelligence, sound judgment, and fair character is not ex post facto as applied to offenses committed before its passage.

663 Changes relating to juries or jury trials in general

While it was determined in an early Supreme Court decision that the Constitution's prohibition against ex post facto laws was violated by a statute reducing the number of jurors required to try an offense below the number required by law at the time the offense was committed, the Court has subsequently held that a 12 member jury is not a necessary ingredient of the Sixth Amendment's guarantee of trial by jury in all criminal cases. Rulings from other courts now support this view. The Supreme Court has also held that the Ex Post Facto Clause in Article I, ß 10 of the United States Constitution does not prevent a state from taking away a criminal defendant's right to jury trial under the United States Constitution's Sixth Amendment, because, although the right to jury trial provided by the Sixth Amendment is a "substantial" one, it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause.

A statute altering the qualifications of jurors has been held not to amount to an ex post facto law in violation of the Constitution, as applied to the trial of offenses committed prior to its enactment. No ex post facto violation results from applying a statute which provides that a venireperson's qualifications are not grounds for a new trial or reversal if the juror was removed by peremptory strike, given that the statute was procedural in nature and became effective prior to the final disposition of the appeal. Also, it has been held that the granting or withholding of peremptory challenges is solely a matter of procedure; and the rule is established that a law curtailing the number of peremptory challenges which a defendant may have in the impaneling of a trial jury, enacted after the commission of the offense charged, is not ex post facto as to such offense. On the same principle a subsequent act increasing the number of the state's peremptory challenges is not ex post facto.

An act providing for bifurcated proceedings of determinations of guilt and punishment in felony cases does not violate a state's Ex Post Facto Clause, even though the act applies to criminal acts that occurred before its effective date. But where, under a law in effect when an offense was committed, a sentencing court could not impose a sentence for a term of years that equaled or exceeded the defendant's life expectancy in the absence of a jury directive or jury approval of a life sentence for arson causing death, the ex post facto doctrine prohibited application to the defendant of a statutory amendment eliminating the need for jury approval of a life sentence. Changing the place of a trial after commission of an offense does not violate the ex post facto prohibition, nor does replacing punishment of life imprisonment or death, at the jury's determination and recommendation, with a separate sentencing hearing (at which the defendant could present mitigating evidence) and automatic appellate review.

664 Changes as to functions of court and jury; sentencing procedures

Statutes altering the procedure for sentencing an accused convicted of a crime have been held not to amount to ex post facto laws, even as applied to offenses committed prior to their enactment. A statute enacted subsequent to commission of a murder by a defendant, providing that in determining the punishment to be imposed, evidence may be introduced of defendant's background and history, and of any facts in aggravation or mitigation of penalty, including evidence which would not have been admissible at trial under the law as it existed at the time of the offense, was not ex post facto as to defendant. Application of a new sentencing procedure to convictions for crimes committed prior to the effective date of the act did not violate the constitutional prohibition against ex post facto laws, notwithstanding that the new procedure allowed the jury to be informed of the defendant's prior convictions of burglary, something that could not have been done at the time he committed the offense of which he had been convicted. And a state law which did not take away the defendant's right to elect to have the jury assess his punishment, but merely changed the time at which the defendant could elect to exercise this still existing right, was not an ex post facto law. No violation of the Ex Post Facto Clause was found from legislation changing the sentencing role of the court and the jury in death penalty prosecutions, particularly where such changes were, on the whole, ameliorative. A change in the law so as to require the jury instead of the court to fix the punishment (but not a change shifting the fixing of punishment from jury to court), or requiring the court rather than the jury to fix punishment, as well as one which makes the court instead of the jury judge of the law, is not unconstitutional as being ex post facto.

Admission of victim impact evidence at sentencing pursuant to a statute which came into effect after the defendant committed the criminal conduct but before his trial did not violate the prohibition against ex post facto laws as the legislative change which permitted the victim impact statements at sentencing was procedural.

665 Changes affecting appellate review

Statutes changing the law with respect to the availability of or procedure for obtaining judicial review of a lower court decision have been held not to violate the prohibition against ex post facto laws found in the United States Constitution. Thus, the ex post facto ban has been held not to have been violated by a statute establishing a shorter but still sufficient time limit within which an appeal must be taken. Retroactive application of a statute that requires defendants to object in order to preserve sentencing issues for appeal does not violate the constitutional prohibition on ex post facto laws, since the statute does not change the legal consequences of the acts that the defendant committed, but rather was merely a procedural change. And where a state postconviction procedure act's changes to capital postconviction relief procedures did not alter or remove capital petitioners' access to a remedial review provided by the statute, the new procedures did not violate the Ex Post Facto Clause.

Creation of appellate jurisdiction where none existed before is not within the constitutional prohibition against ex post facto laws.

666 Legislation, rules, and procedures affecting postconviction parole, supervised release, probation, clemency, or early release

Disciplinary measures imposed on prison inmates for failing to obey orders do not violate the Ex Post Facto Clause, and a procedural change in the parole system is not an ex post facto violation, even though it may work to an inmate's disadvantage. A statute amending parole procedures to allow a state parole board to decrease the frequency of parole suitability hearings under certain circumstances does not violate the Ex Post Facto Clause as applied to a defendant who was convicted prior to the amendment, since the statute does not increase the defendant's punishment, but simply alters the method to be followed in fixing a parole release date under identical substantive standards.

Adoption of the "salient factor scoring analysis" for use in setting release dates for prison inmates does not violate the Ex Post Facto Clause by introducing guidelines not in effect at the time of the inmates' convictions; while this system changes the method to be followed in setting release dates, it does not mandate a particular result that would necessarily lengthen an inmate's confinement.

A prison inmate's substantive rights are not diminished by rules changing the procedure for obtaining a clemency hearing, but providing a substantive review of the clemency request; therefore, retroactive application of the rule requiring an inmate to obtain a waiver in order to seek commutation of an active sentence does not violate the Ex Post Facto Clause, even though the inmate's request for a waiver was denied. But a parole board's extension of a defendant's release date for two years under provisions of an amendment to a statute that became effective after his incarceration does violate the ex post facto clauses of the state and the federal constitutions. Application to a defendant of a statute, providing for a three-year period of parole or postprison supervision following a murder conviction, violates the constitutional prohibitions against ex post facto laws, where the rules in effect when the defendant committed the murder provided for a term of parole shorter than three years. And a statutory amendment that requires that 85 percent of a sentence be served and that eliminates opportunities for parole that had previously existed is an ex post facto law as applied to defendants who had been charged with crimes before the effective date of the statute and whose charges were not to be disposed of until after the effective date.

Observation: Because supervised release, a concept that has replaced parole in the federal system, is, unlike parole, a form of punishment that is separate from the maximum incarceration period that attaches to the original offense, violation of supervised release also results in a separate punishment that does not implicate the Ex Post Facto Clause.

Without going so far as to decide the issue, the Supreme Court has indicated that a statute taking away parole eligibility for offenses subject to parole according to the law at the time they were committed could be found to be constitutionally impermissible as an ex post facto law. Numerous other changes affecting parole or probation rules and procedures have been held violative of the ex post facto clauses. Other such changes have been held not violative of these clauses. The same is true of early or temporary release programs. Some changes affecting these programs have been held unconstitutional, while other changes have been held constitutional.

667 Legislation changing limitations of actions

Extending a statutory limitations period before a given prosecution is barred does not violate the Ex Post Facto Clause. Thus, retroactive application of an amendment extending a statute of limitations on tax collection actions from six years

to 10 years does not impose punishment, and cannot be held to violate the Ex Post Facto Clause, and Congress may extend a criminal limitations period without running afoul of the Ex Post Facto Clause so long as the original period has not yet expired.

A statute of limitations requiring a prisoner to petition for postconviction relief within three years of the date of the final action in the prisoner's case or forego the right to petition, but which allowed the petitioner seeking to bring any post-conviction petition that would have been barred on the date of enactment of the statute three additional years from that date in which to file the petition, was not an ex post facto law and did not violate due process requirements. No ex post facto or due process violation resulted from requiring a defendant, seeking to reopen a judgment based on the alleged ineffective assistance of appellate counsel, to show good cause for failing to file his application within 90 days after journalization of the appellate decision affirming his conviction, even though the rule incorporating the 90-day filing deadline was adopted after the conviction was affirmed, since motions to reopen the appeal were previously available and the requirement that good cause be demonstrated was not new. And notwithstanding that a statute shortening the limitations period during which a defendant could file for postconviction relief in capital proceedings considered facts existing prior to its enactment, the statute was nonetheless prospective rather than retrospective, and thus not an ex post facto application of the law, since the new limitations period was in effect and the limitations period had not begun to run when the defendant filed his first petition for postconviction relief.

668 Legislation changing rules of evidence

The general rule is that any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed may be obnoxious to the constitutional inhibition upon ex post facto laws. This rule applies to changes in the measure or character of evidence requisite to conviction, where the situation of an accused is altered to his or her disadvantage either by excluding evidence in his or her behalf which was admissible at the time of the alleged commission of his offense, or by admitting evidence against the accused which was inadmissible at such time. However, a statute permitting, in a sex offense prosecution, admission of evidence regarding defendant's commission of a prior sex offense does not alter the definition of the crime, increase the punishment, or eliminate a defense; thus, application of the statute in a trial of an offense committed prior to the effective date of the statute does not violate the Ex Post Facto Clause of the state or federal constitutions.

Permitting testimony under an act providing for victim impact testimony does not constitute an ex post facto law. By expanding the scope of permissible evidence during the penalty phase, the legislature has not expanded the scope of punishment or added any new aggravating circumstance. Application of a statute to allow the admission of evidence of other crimes and misconduct in a retrial in a sodomy case was not an ex post facto law; the statute merely changed the rules of evidence without changing the elements of the crime or authorizing conviction on less or different proof. And a statute providing that in certain prosecutions involving a victim under 14 years of age, evidence that the defendant has committed other charged or uncharged crimes involving victims under 14 years of age is admissible, is not an ex post facto law; it involves a change in a rule of evidence, but does not change the elements of the offense or the punishment for the offense.

Statutory changes in the rules of evidence which do not deprive the accused of a defense, and which operate only in a limited and unsubstantial manner to his or her disadvantage, are not prohibited as ex post facto laws, and Congress and the state legislatures may modify and control the rules of evidence and may apply new rules to pending causes of action, provided a party is not deprived of his or her right to present a proof.

Some courts have expressed doubts as to whether every law which may come within the rule concerning evidence is really an ex post facto law, with the result that the general rule has been limited to some extent in that it does not apply to rules which merely relate to the mode of presenting questions and proof as to the relative credibility or genuineness of evidence, where the right of the jury to determine the sufficiency or effect of the evidence is left unimpaired. But a shift in the burden and degree of proof relating to an insanity defense has been held to constitute an ex post facto law.

669 Legislation changing rules as to witnesses

The prohibition relating to ex post facto matters generally has no application to statutory changes which merely affect the competency of witnesses to testify. Such statutes are not ex post facto in their application to prosecutions for crimes committed prior to their passage, since they do not attach criminality to any act previously done and which was innocent when done, nor do they aggravate any crime theretofore committed, provide a greater punishment therefor than was prescribed at the time of its commission, or alter the degree or lessen the amount or measure of the proof which was made necessary to conviction when the crime was committed.

670 Legislation changing tribunals, jurisdiction, or venue

In accordance with the general principle that the constitutional prohibition as to the passage of ex post facto laws does not prevent the legislature from making changes in procedure, it is well established that changes as to judicial tribunals generally are to be considered as relating to the remedy only. Therefore, without coming within the terms of this constitutional prohibition, a state may abolish old courts and create new ones, create appellate jurisdiction where none existed before, transfer jurisdiction from one court or tribunal to another, make changes as to the number of judges who shall preside at a trial, make changes as to venue, and, generally, effect any other changes in the instrumentalities of justice, so long as all the substantial protections with which the existing law surrounds the person accused of a crime are left unimpaired.

671 Generally; nature and definition of bills of attainder

Bills of attainder are legislative acts that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. Bans on bills of attainder prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.

The Federal Constitution contains a prohibition against the enactment of bills of attainder by Congress and also by the states. In some states, provisions in the state constitution also ban bills of attainder, and these bans have been held applicable to any form of legislative action, including direct action by the people.

Practice guide: In analyzing a bill alleged to be an attainder, relevant precedents under the Federal Constitution's Bill of Attainder Clause proscribing the Federal Government from passing a bill of attainder and under a state constitution's clause proscribing a state from passing a bill of attainder generally may be used interchangeably.

In order for a statute to constitute a bill of attainder, three elements are necessary -- nonjudicial punishment, lack of a judicial trial, and specificity in identification of the individuals affected. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether these three definitional elements are contained in the statute.

Only the clearest proof can suffice to establish the unconstitutionality of a statute on the ground that it constitutes a bill of attainder.

Observation: However expansive is the constitutional prohibition against bills of attainder, it does not serve as a variant of the equal protection clause, invalidating every act of Congress or the states that legislatively burdens some persons or groups, but not all other plausible individuals; while the Bill of Attainder Clause serves as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all. Still, Congress cannot pass a bill of attainder contrary to the provisions contained in such prohibition merely because Congress concludes that such a measure is authorized by Article I, ß 8, cl. 18 of the Constitution as being "necessary and proper" to the discharge of its substantive legislative authority.

672 Applicability of ban to various enactments and persons

The constitutional prohibition on bills of attainder applies to legislative enactments passed after the commission of the offense that is to be punished. The Bill of Attainder Clause of the Federal Constitution does apply to a treaty which targets specific individuals for punishment, even though the treaty may not be considered "legislation." However, the federal prohibition against bills of attainder applies to legislative acts only and not to regulatory actions of administrative agencies. And state prohibitions against bills of attainder do not apply to state bar rules dealing with attorney reinstatement.

The Bill of Attainder Clause is a limitation on the authority of the legislative branch, and is not applicable to the executive branch. Moreover, there is authority to the effect that a law of a foreign country cannot constitute a bill of attainder, because the constitutional prohibition does not apply to foreign laws. The Supreme Court has recognized that a bill of attainder may exist only as to laws relating to the rights of individual persons and private groups, not as to the rights of governments, such as a state or its political subdivisions.

The constitutional prohibition against the passage of bills of attainder may be successfully invoked by aliens and other noncitizens; however, a statute requiring deportation of persons shown to have participated in Nazi persecution during World War II is not a bill of attainder because deportation is not considered to be punishment.

673 Bills of pains and penalties

When the Constitution was adopted, both "bills of attainder" and "bills of pains and penalties" were well known in the English law, and these terms had a clear and well-defined meaning. Bills of attainder were acts of Parliament whereby a sentence of death was pronounced against the accused. Bills of pains and penalties were acts pronouncing milder punishments. As used in the Federal Constitution, "bills of attainder" includes bills of pains and penalties. Thus, a bill of attainder may affect the life of an individual, or may confiscate his or her property, or may do both.

674 Nonjudicial infliction of punishment; lack of trial

Two elements of what constitutes a bill of attainder prohibited by the Constitution are the presence of punishment which, as to a particular law, provision, or action challenged on bill of attainder grounds, is inflicted by an authority other than a judicial authority, and the lack of a judicial trial. The rationale behind the ban on bills of attainder is grounded in the concept of separation of powers; the process by which individuals are punished is a function of the judiciary and this function should not be conducted by the legislature. Thus, legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial, are bills of attainder prohibited by the Constitution.

Observation: Legislatures may, without violating the constitutional prohibition against bills of attainder, act to curb behavior which the legislatures regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one.

675 Existence of punishment; tests

The key feature in determining whether the constitutional proscription of a bill of attainder is implicated is punishment, and in determining whether a particular governmental action is punitive in nature, courts must inquire whether the statute is of a type traditionally considered punitive, whether it furthers nonpunitive legislative purposes, and whether it evinces a congressional intent to punish. In regard to the element of nonjudicial infliction of punishment, the Supreme Court and other courts have indicated that the existence of punishment is dependent upon the circumstances of individual cases, although the Court has delineated certain "tests" which may be applied in determining whether punishment is present. One test is that of historical experience, or the traditional test, which involves an analysis of punishment in terms of what historically has been regarded as punishment for purposes of bills of attainder and bills of pains and penalties under the laws of England and the United States. A second test is a functional one which takes into account the extent to which any enactment challenged as a bill of attainder furthers any nonpunitive purposes underlying it. A third test for determining the existence of the punishment element is a motivational one, involving an assessment of the purposes or motives of the legislative authority. Thus, for purposes of the federal and state constitutional prohibitions against bills of attainder, in deciding whether a statute inflicts punishment, a court must consider: whether the challenged statute falls within the historical meaning of legislative punishment; whether the statute, viewed in terms of type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and whether the legislative record evinces a legislative intent to punish. The burden is on the person claiming to be the target of legislatively imposed punishment to establish that the legislative act constitutes punishment and is not a legitimate regulation of conduct. Simply because a law places burdens on citizens does not make those burdens punishment for purposes of bill of attainder analysis, and an otherwise valid law is not transformed into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals.

For purposes of showing that a statute violates the Bill of Attainder Clause, a statute inflicts forbidden punishment if it falls within the historical meaning of legislative punishment, furthers no nonpunitive legislative goals, and shows Congress' intent to punish as reflected in the legislative record. If a legislature intends a restrictive measure to be punishment, i.e., retribution is one of its actual purposes, then it is "punishment" for purposes of the Bill of Attainder Clause; if, on the other hand, restriction of an individual comes about as a relevant incident to a regulation, the measure will pass the requirement that it have an actual purpose, as required for the measure to constitute nonpunishment. If a law cannot be explained solely by a remedial purpose, it is "punishment" for purposes of the Bill of Attainder Clause. Even where a fixed identifiable group is singled out and a burden traditionally associated with punishment is imposed, an enactment may pass scrutiny under a bill of attainder analysis if it seeks to achieve legitimate and nonpunitive ends and is not clearly the product of punitive intent; the question is whether the legislative aim was to punish individuals for past activity or whether the restriction comes about as irrelevant incident to regulation of present situation such as proper qualifications for a profession.

While there is no universal test for determining whether state action constitutes punishment as applied to the constitutional theory relating to bills of attainder, a court will normally consider the totality of the circumstances and, particularly, the legislative intent, the design of the legislation, the historical treatment of analogous measures, and the effects of

the legislation. For purposes of determining whether a law is not a bill of attainder, a measure must pass a three-prong analysis -- actual purpose, objective purpose, and effect -- to constitute nonpunishment.

It has been indicated that a formal legislative announcement of punishment is not necessary for bill of attainder purposes, that the degree of sanction or burden which is involved is not necessarily determinative of punishment, that a shifting of economic burdens so as to place a greater share on a particular party is not the type of punishment considered violative of the Bill of Attainder Clause, and that harm inflicted by governmental authority is not necessarily punishment.

As to general classes of sanctions or burdens, there is authority indicating that, for bill of attainder purposes, the sanction of corruption of blood, namely, a bar on an individual's receiving or transmitting property, constitutes punishment, as does the deprivation of political or civil rights. Punishment may be conditional, and it includes prevention as well as retribution. The punishment element of a constitutionally prohibited bill of attainder is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his or her future misconduct. Such a view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect.

One feature which has a bearing upon whether an enactment constitutes punishment for purposes of the Constitution's ban against bills of attainder is whether a person or group affected by the enactment may "escape" any punishment -- true escapability indicating (but not definitely establishing) that there is no punishment for bill of attainder purposes. Thus, where any burdensome consequences or effects of an enactment upon an individual or group are of such a nature that they are not based on the past conduct of such individual or group, so that the individual or group may escape the enactment's burdensome consequences or effects by an alteration of conduct, the punishment element of a bill of attainder is not present.

676 Specificity

One of the definitional elements of what constitutes a bill of attainder prohibited by the Constitution is the element of specificity, that is, the singling out or designation of an individual or ascertainable group. The singling out of an individual for a legislatively prescribed punishment constitutes "attainder" whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. An ordinance is not made an "attainder" by the fact that the activity it regulates is described with such particularity that, in probability, few organizations will fall within its purview. The fact that a bill of attainder may be addressed to a group or a class rather than to an individual does not prevent it from being considered a bill of attainder. The fact that a statutory provision defines what is in effect a class of one does not necessarily render the statute void as a "bill of attainder." Specificity may take the form of a description of past conduct rather than the naming of an individual or group, but a description in terms of present or future conduct does not satisfy the specificity element.

In regard to the relationship of underinclusiveness to specificity, the mere fact that an enactment focuses upon one or a few out of many of what can be viewed as a class does not necessarily result in specificity, and that underinclusiveness is not a necessary feature of a bill of attainder. Although the Supreme Court has noted, with regard to the specificity element, that shorthand phrases may be used in summarizing characteristics with which an enactment is concerned without there being a violation of the bill of attainder prohibition, it also has been recognized that such shorthand phrases must not be overbroad.

677 Particular legislation as within prohibition; Communism, subversion, and activities against the government

It has been held that a federal statute (since repealed) aimed at the control of subversive activities and requiring registration of "Communist-action" organizations with the United States Attorney General did not constitute an unconstitutional bill of attainder, where as the statute, although intended to reach the operations of the Communist Party, did not attach to any specified organization, but rather to described activities in which an organization might or might not engage. And a rule under which an applicant was denied admission to a state's bar for declining to answer questions relating to membership in the Communist Party has been upheld against the contention that the rule violated the prohibition against bills of attainder. However, a provision of a federal labor statute making it a crime for a Communist to serve as an officer or employee of a labor union has been struck down as a bill of attainder.

Some enactments, dating from the time of the Civil War or Reconstruction, setting forth loyalty oath requirements have been ruled by the United States Supreme Court to be bills of attainder, but other enactments setting forth loyalty oath requirements have been held not to constitute bills of attainder on the basis that the punishment element of a bill of attainder was not present.

678 Criminal laws; generally
Recidivist criminal laws of the type commonly known as "three strikes" laws do not constitute bills of attainder, because they do not specify the persons sought to be punished or identify them by past conduct, and because a judicial sentencing hearing is necessary to determine the existence of two prior "strike" offenses.

A portion of a law that made amendments to a restitution statute retroactive did not constitute a bill of attainder, since restitution was already required under the statute; the amendment affected the time of the restitution hearing, but did not inflict punishment and did not permit the imposition of restitution without a judicial trial.

A statutory ban on assault weapons does not inflict punishment without a judicial trial so as to be a bill of attainder, where the ban applies only to conduct that occurs after the effective date of the statute, and the penalty applicable to those who possess prescribed weapons in the future may be imposed only on those duly convicted after a judicial trial. The statutory ban on assault weapons is not a legislative punishment of the assault weapons manufacturer without a judicial trial so as to be a bill of attainder, even though the statute prohibits the manufacturer from selling two of its weapons in the state, where it also prohibits everyone else from possessing or selling those weapons. Specifically proscribing the firearms by the name of the manufacturer does not transform the ban into a bill of attainder.

A statute providing that it is a crime against nature for a human being to solicit another with intent to engage in any unnatural carnal copulation for compensation is not an unconstitutional "bill of attainder"; the statute does not apply to easily ascertainable members of a group, but rather applies to everyone who engages in the proscribed conduct, and it does not inflict punishment without a judicial trial. Amendment of a statute to allow the use, as an aggravating factor, of prior murder convictions still on appeal is not a bill of attainder, since the amendment changed the law for all capital defendants and did not affect legislative determinations of guilt for any particular defendant or group of defendants.
679 Methods of execution in capital punishment cases
The Department of Justice's lethal injection regulations, governing the procedure for execution of federal offenders, did not constitute an unconstitutional bill of attainder, where the defendant had been tried in court, convicted and sentenced to death by jury, and the regulations were merely procedures for carrying out punishment which did not determine either his guilt or degree of his punishment. The federal death penalty statute for persons who kill during the course of specified offenses, by allowing the government to identify and prove nonstatutory aggravating factors, is not an unconstitutional bill of attainder.

A state statute which provided an optional provision for death by lethal injection at the election of the defendant in addition to a previously mandated death by hanging was not, as a result, an unconstitutional "bill of attainder," as death by lethal injection was not a legislatively created punishment, but a sentence of death.
680 Parole, probation, and supervised release rules and regulations
A state statute determining eligibility for release on parole is a law of neutral application rather than an unconstitutional bill of attainder specifically passed by the state legislature to deprive a defendant of his or her liberty without a judicial trial, especially in light of the fact that a defendant has had the benefit of a trial prior to his or her punishment.

A Board of Parole and Post-Prison Supervision's designation of a prisoner as a "predatory sex offender" does not constitute punishment, and thus the designation does not violate the prohibitions against bills of attainder. Statutes requiring registration and community notification of convicted sex offenders do not impose punishment for past crimes, and thus do not violate the ban on bills of attainder. Such statutes are totally remedial in purpose, and any deterrent effect from the offenders' loss of anonymity is merely an inevitable consequence, which thus supports the conclusion that the statutes do not impose punishment for purposes of a constitutional challenge under the Bill of Attainder Clause. The statutes are designed solely to enable the public to protect itself from the danger posed by sex offenders who are widely regarded as having the highest risk of recidivism. A state statute which provides for the collection of blood and saliva specimens from certain convicted felons for use in preparing "genetic marker groupings," primarily deoxyribonucleic acid (DNA) analysis, to detect and deter the commission of crimes by recidivists is not an unconstitutional bill of attainder as imposing an additional punishment on those convicted of certain crimes, while not affording them an opportunity to be heard. The minimal intrusion imposed incident to the statute does not result in punishment, and notice inheres in the legislative process by which the statute was enacted. A statute providing that persons convicted of certain sex crimes or determined to be sexually dangerous persons cannot be paroled except on the recommendation of a psychiatrist is not an unconstitutional bill of attainder, inasmuch as it bears a reasonable relationship to the proper, nonpunitive state purpose of ensuring that prisoners released on parole will likely be able to successfully serve the remainder of their sen-

tences out of physical custody. An amendment to a state statute governing a sexual offender program, requiring prisoners to "successfully complete" a program to be entitled to parole is not a bill of attainder; the statute applies only to persons who have already been convicted of sex offenses.

A parole board's action in increasing an inmate's parole ineligibility does not constitute an unconstitutional bill of attainder where the parole board did not find the inmate guilty again in its proceedings, but merely gave res judicata effect to the findings at prison disciplinary proceedings. A parole eligibility statute, providing for classification of convicted felons for purposes of parole eligibility based on the number of prior convictions, does not constitute a bill of attainder which violates either the federal or state constitutions.

681 Prison rules and regulations; suspension of benefits legislation

Generally speaking, prison rules and regulations are not unconstitutional bills of attainder. Thus, a law permitting prison officials to impose a five dollar copayment on an inmate for medical visits is not bill of attainder; the law did not apply to named individuals or to easily ascertainable members of a group, but rather applied to all inmates in nonemergency medical situations who voluntarily sought medical treatment and had the funds to pay a nominal copayment, and the law did not inflict any punishment. Disciplinary sanctions for prison rule violations are not within the constitutional prohibitions against bills of attainder where, at its most severe, the disciplinary process could not extend the sentence imposed by the court. And a state inmate did not state a bill of attainder claim arising out of his security reclassification and transfer to a different institution by state correctional officials where he did not claim that the state officials enacted any rules for the purpose of punishing him without a judicial trial.

A statute providing for suspension of Social Security Disability benefits to an individual who is confined in a penal institution and not participating in a rehabilitation program is constitutional, and is not a bill of attainder.

682 Sentencing laws and guidelines

The Sentencing Reform Act and the United States Sentencing Guidelines are not unconstitutional bills of attainder simply because they permit courts to impose increased punishments because of relevant conduct. The Act and Guidelines do not specifically single out any one individual for increased punishment, but instead provide for increased punishment of all individuals who have engaged in certain additional relevant conduct. The relevant conduct provision of the Sentencing Guidelines, permitting a court to consider conduct other than that for which the defendant was convicted, is not an unconstitutional bill of attainder. A drug distribution statute's use of a lower weight threshold for cocaine base offenses than for powder cocaine offenses in triggering a 10-year mandatory minimum sentence does not make the statute an unconstitutional bill of attainder, despite the statute's purportedly disproportionate effect on black defendants. A statute mandating a life sentence upon conviction for a felony committed during a term of probation for a prior felony is not an unconstitutional bill of attainder.

683 Environmental protection laws and regulations

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and its retroactivity provisions do not violate the bill of attainder provisions of the United States Constitution. An allegedly burdensome and excessive solid waste management ordinance was not an unconstitutional bill of attainder, even though the solid waste collector was the only entity which had operated a landfill in the past and the only entity currently pursuing the project for which a permit was required under the ordinance, since the ordinance did not single out the collector, but attached itself to described activities, and since the ordinance was not punitive, particularly as it did not prevent the collector from operating a landfill in the county. A statutory provision subjecting a sewer utility to a state public service board's jurisdiction was not an unconstitutional bill of attainder, inasmuch as the legislature did not enact the provision as a form of punishment, the provision furthered nonpunitive legislative purposes by subjecting the company operating the monopoly utility to regulation by the Board, and the legislature did not confiscate the utility's property nor bar it from the sewer business. A city licensing law whose termination clause required trade waste carters, in the absence of a waiver from the city trade waste commission, to notify customers that they could cancel their contracts with the carters unless the carters received a new license from the commission, did not constitute an impermissible "bill of attainder" either facially or as applied to carters whose waiver applications were denied by commission; the law furthered legitimate nonpunitive legislative purposes, did not confiscate property, and did not bar designated individuals or groups from participating in the carting industry. Amendments to a state's environmental conservation law to prohibit trawlers from taking, landing, or possessing lobsters in certain waters of the state do not violate the United States Constitution's prohibition on bills of attainder under the traditional test, the functional test, or the motivational test, where the amendments did not confiscate the property of the trawlers but only regulated the manner in which the property could be used; the amendments did not bar the trawlers from their occupation, and the amendments were rationally related to the state's interests in conserving its marine resources.

684 Firearms legislation
A statute proscribing possession of firearms by a person previously convicted of a crime punishable by one year or more of imprisonment applied to past convictions of crimes which, under the classifications of the present criminal code, would not be punishable by one year or more imprisonment; such an application is not an unconstitutional imposition of a bill of attainder. Identification of guns by tradename in a state's assault weapons control act, proscribing the manufacture, sale, transfer, possession, distribution, transportation, and importation of numerous firearms without a permit, did not make the act an unconstitutional bill of attainder, as the asserted economic punishment was indirect and in no way amounted to punitive confiscation. The act furthered nonpunitive legislative purposes, and there was no indication of any intent to punish.

The Gun Control Act of 1968, part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, has been upheld as against the contention that it is a bill of attainder.
685 Military laws and policies; veterans' benefits
An Air Force policy to the effect that a statement by an officer that he is a homosexual creates a rebuttable presumption that the officer has a propensity to engage in homosexual acts is not a bill of attainder. A military policy pertaining to homosexuality does not fall within the historical meaning of legislative punishment; under the policy homosexuals are not barred from the military simply because they are homosexuals, since the policy leaves open the possibility of qualifying for continued service in the military when the person has declared himself to be a homosexual, but overcomes the presumption that he has a propensity to engage in homosexual act. An amendment to a regulation of the Puerto Rico Air National Guard which stated that members who tested positive for the human immunodeficiency virus were not entitled to a hearing prior to transfer to the standby reserves and discharge, was not an illegal bill of attainder; the amendment was a duly-approved, general policy change designed to effect the nonpunitive purpose of eliminating unnecessary, costly procedures.

A "door-closing" statute forbidding judicial review of individual veterans' benefits decisions does not qualify as a bill of attainder. And a statute and regulation prohibiting the payment of pension benefits to veterans during their incarceration in a correctional facility is not an unconstitutional bill of attainder. The provisions at issue involved the suspension of a noncontractual benefit, they provided for apportionment to the veterans' spouse or children of the pension otherwise payable to the veteran, they allowed for resumption of payment of the pension to the veteran upon his release from incarceration, and they were rationally related to and furthered nonpunitive legislative goals. A statute limiting educational benefits for a veteran who is incarcerated in a federal, state, or local institution to the cost of tuition, fees, and supplies, thereby denying the veteran the subsistence benefits to which he would otherwise be entitled, does not constitute a bill of attainder since a denial of noncontractual government benefits cannot be said to amount to punishment.

A statute denying federal financial aid to male students who failed to register for the draft was not a "bill of attainder" by singling out nonregistrants and making them ineligible for aid based on their past conduct in failing to register where the statute clearly gave nonregistrants 30 days after receiving notice that they were ineligible for aid to register for the draft and qualify for aid. A similar statute providing that male residents born after December 31, 1959, who do not file a certification of registration with the selective service system, are not eligible for state-subsidized college and university tuition does not impose a penalty without benefit of a criminal proceeding, in violation of a state constitutional provision prohibiting imposition of punishment by the legislature, but rather is the consequence for failure to comply which is limited to the imposition of a tuition rate at the true value of the services rather than the subsidized rate.
686 Public employment laws and policies
Legislation contained in a general appropriation act which had the effect of altering the terms, conditions, and nature of the commission of an administrative justice of the housing court was not violative of the prohibition against bills of attainder contained in a state's Declaration of Rights, absent evidence, other than statements attributed to individual legislators, to establish the truth of the assertion that the motive and purpose of the legislation was the refusal of the administrative justice to accede to demands of certain legislators with respect to the exercise of the judicial appointment power. And while workers' compensation hearing referees may have had legitimate expectations of continued employment as hearing referees, statutes eliminating the position of hearing referee and creating a board of magistrates did not deprive the hearing referees of their civil service status and did not punish them. Thus, the statutes were not unconstitutional bills of attainder. A city's enactment of a budget which reduced the pay and scope of the personnel director's position did not amount to unconstitutional "bill of attainder." A statute providing for forfeiture of a public employee's pension for less than honorable service does not constitute a bill of attainder, since it applied only to proscribed conduct occurring on or after the effective date of the statute. However, a legislature violated federal and state constitutional prohibi-

tions against bills of attainder by passing a local law the day after a county commissioner was named to the unexpired portion of a deceased commissioner's term, stating that such appointment would be temporary until an election was held.

The Hawaii Constitution's resign-to-run provision does not constitute an unconstitutional bill of attainder; the burdens to the constitutional rights of a mayor who wished to run for the office of governor without resigning and the voters who wished to vote for him were minimal, and the resign-to-run provision furthered several nonpunitive legislative purposes. A constitutional amendment placing a limit on the number of terms which legislators and other state officials may serve is not an unlawful bill of attainder, even though proponents of the initiative measure had argued that one of the effects of its adoption would be to end the reign of two powerful legislative officers. But removal of a justice of a state supreme court by majority vote of both houses of the legislature without an opportunity for the justice to be heard violates the prohibition against bills of attainder, if the removal could be construed as punishment for past misconduct. However, the justice's impeachment for an official misdemeanor, which gives the justice an opportunity to be heard, does not violate the state constitutional prohibition against bills of attainder.

A provision of a city's school reform act depriving principals whose contracts are not renewed of tenure they earned as teachers does not violate the prohibition against bills of attainder. Governmental denial of compensation or appropriation does not constitute a bill of attainder unless the denial constitutes a ban on continuing public employment. Thus, a city's failure to increase the city auditor's salary was not a bill of attainder.

687 Tax laws and regulations

The Internal Revenue Code is not a bill of attainder. Neither does the assessment of statutory penalties by the Internal Revenue Service constitute a bill of attainder, as the Internal Revenue Code does not determine guilt, the tax laws do not punish, and there is no selection of any specific individual or group of individuals, as the tax laws apply to all income earners. The statute governing the penalty for filing a frivolous tax return proscribes conduct only, and does not inflict punishment on a specific group, and therefore is not a bill of attainder. An Internal Revenue Code section authorizing the Commissioner of Internal Revenue to devise a method that clearly reflects income if the taxpayer does not have a regular method of accounting or if the method used does not clearly reflect income does not determine guilt and does not punish or single out any particular person or group, and therefore is not a bill of attainder. A civil fine imposed upon a plaintiff for filing a tax return which does not contain information on which the substantial correctness of a self-assessment may be judged does not constitute a bill of attainder. And a taconite tailings tax statute, which imposes a tax upon mining companies that do not deposit tailings on land in accord with state permits, does not violate the constitutional prohibitions against bills of attainder since the tax could apply to a legitimate class of tailings producers, there was no intent to punish, and no actual punishment was imposed, even though the mining company challenging the tax statute was the only member of the class.

688 Zoning laws and regulations

In order for a zoning ordinance to constitute a "bill of attainder," it must apply only to an individual or identifiable group, and the purpose behind the ordinance must be to punish without the benefit of a judicial trial. Whether the purpose of the ordinance is to punish can be measured by an historical test, a motivational test, and a functional test. A zoning ordinance restricting acquisition of a permit for renovation of apartment buildings in certain neighborhoods is not an unconstitutional bill of attainder where the ordinance does not absolutely deny owners the right to renovate the property and where there was evidence that the ordinance's intent is to prevent displacement of low income tenants, rather than simply to punish the landlords affected. An amended zoning ordinance changing lot size requirements for dwellings from one to two acres is not a bill of attainder where the amendment does not single out any landowner or refer to any properties in terms of the identity of the owner. A city's general plan amendment changing a property's land use designation is not an unconstitutional bill of attainder, where there is no showing of any intent to punish the property owner. A so-called "loft law," requiring owners of certain loft buildings converted from commercial to residential use to bring such buildings into compliance with previously ignored building codes, with much of the cost being passed on to the tenants in the form of temporary rent adjustments, is not an unlawful bill of attainder, inasmuch as the law imposed only the sort of economic burdens that marked all regulatory legislation, it furthered legitimate public goals which were well within the scope of the state's police power, and where there was no evidence of any legislative intent to punish the owners. Adoption of an ordinance establishing a two-mile buffer zone between landfills and main sources of water was not a bill of attainder directed at the landowner, even if the landowner's application for a landfill permit may have been the immediate catalyst for the quorum court action, where the ordinance did not provide a specific penalty for the landowner or landfill owners in general.

A town's portable sign ordinance does not violate the constitutional prohibition against bills of attainder. However, rescinding a building permit may, under certain circumstances, constitute a "bill of attainder."

Zoning ordinances restricting the location of so-called "adult businesses" within a city, by precluding any such business from operating within 500 feet of a residential or office district, do not amount to unlawful bills of attainder, where their purpose is not to inflict punishment, but to regulate the use of land, and where they apply across-the-board to all similarly situated property owners. And a city ordinance limiting areas of the city in which sexually oriented businesses could operate is not an unlawful bill of attainder; restrictions in the ordinance were imposed not to punish the operators of sexually oriented businesses for their past conduct, but to protect citizens from the adverse secondary effects those businesses have on the quality of life in the areas where they operate. A city ordinance prohibiting public nudity failed the motivational test, and thus did not constitute "punishment" under the Bill of Attainder Clause, even if the timing of the ordinance made it likely that the city council was responding to the nightclub operators' intention of providing nude entertainment.

A municipal ordinance prohibiting unlicensed massagists from massaging persons of the opposite gender is not an unconstitutional bill of attainder; the ordinance applies to all persons who perform cross massages without a proper license and does not single out specific persons or persons with specific characteristics. And a city ordinance which applies to "any person" and "every person" desiring to conduct a massage parlor business does not single out any massage parlor owner or purport to punish him without judicial process, and thus the ordinance was not a bill of attainder.

A local act deannexing a portion of a city in which the mayor resided, thus rendering the mayor disqualified from office, was not unconstitutional "bill of attainder" under the state or Federal Constitution; the act neither singled out the mayor nor punished him as an officeholder, as many city residents were affected by the deannexation, nothing on the face of the act suggested a punitive intent on the part of the legislature, and the mayor did not establish that the legislation was not a legitimate regulation of conduct.

689 Miscellaneous laws

Numerous courts in considering a variety of laws, have concluded that such laws were not bills of attainders, including laws --

-- suspending the right of a convicted felon to hold office as a school board member.

-- barring persons who have engaged in felonious conduct within the past 10 years from being eligible for victims of crime compensation awards.

-- prohibiting convicted felons from serving as guardians of disabled persons.

-- voiding a legacy to a person or his or her spouse who attests to a will, unless the will is otherwise duly attested by a sufficient number of witnesses.

-- punishing a defendant convicted of operating a motor vehicle while his or her operator's license is under suspension.

-- enabling a higher education institution to transfer its interest in a loan in default to the Secretary of Department of Education for collection.

-- amending a law (which made it unlawful to engage in outfitting or guiding without a license) to include a "hunting club" within the definition of "outfitters."

Various courts have also found no bills of attainder in miscellaneous liquor laws, insurance laws, Social Security legislation, parking and traffic ordinances, conflict-of-interest laws, and civil rights laws.

690 Generally; meaning of "retrospective laws"

One modern definition of a "retrospective law," often cited, is that "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, is a retrospective statute." Legislation is considered retroactive if its application determines the legal significance of acts or events that occurred prior to the statute's effective date. A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Instead, a court must ask whether the new provision attaches new legal consequences to events completed before its enactment.

The mere fact that a statute has a retrospective application does not necessarily render it unconstitutional. For instance, a statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if it is applied to transactions predating its enactment. The retroactive nature of clarifying legislation has limits and must not operate in a manner that would unjustly abrogate "vested rights," a vested right being one that equates to legal or equitable title to the present or future enjoyment of property or to the present or future enforcement of a demand, or a legal exception from a demand made by another. However, retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. It is quite incompatible with the fundamental notions of the law that an act lawful at the time it was done can, at the stroke of the legislative pen, be rendered unlawful and the actor called to account for a completed, now-condemned deed in the halls of justice.

With respect to determining the retroactivity of legislation, elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. However, legislation readjusting rights and burdens is not unlawful solely because it upsets settled expectations, even if it imposes a new duty or liability based on past acts. In determining whether a retroactive application of legislation will result in manifest injustice, such that it should not be so applied, the inquiry should center upon the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in the law upon those rights. Congress has wide latitude in making civil statutes retroactive.

In analyzing whether a statute or regulation may apply retroactively, a court must determine, first, whether the legislature or an agency intended retroactive application, and, if so, whether retroactive application would work either a manifest injustice or an unconstitutional interference with a vested right. Thus, only those retroactive statutes which, on a balancing of opposing considerations, are deemed to be unreasonable, are held to be unconstitutional.

"Retrospective" has a meaning analogous to "ex post facto" as applied to criminal and penal statutes.

The terms "retrospective" and "retroactive" are frequently used interchangeably, even though, in fact, they have different meanings. For purposes of the Landgraf rule that courts should not apply "retroactive" statutes "retrospectively" absent a clear congressional intent, "retrospective" describes the application of a new statute to events that occurred before its enactment, and "retroactive" describes a statute that, if applied, would attach new legal consequences to conduct or transactions already completed. Despite the foregoing, many courts have held the words "retrospective" and "retroactive" to be synonymous; and, as such, they are often used interchangeably.

A retrospective statute is considered "interpretive," for purposes of determining whether it may be retroactively applied, when it does not create new rules, but merely establishes a meaning that the interpretive statute had from the time of its enactment; it is the original statute, not the interpretive one, that establishes rights and duties. A "substantive law," which ordinarily can be applied prospectively only, is one that creates an obligation such that it creates, confers, defines, or destroys rights, liabilities, causes of action, or legal duties. The rule of prospective application applies to laws that are substantive in nature, while laws that are procedural or interpretive may be applied retroactively.

Observation: The right to a jury trial, where it exists, is a substantive right, not a procedural one, for purposes of determining whether a law affecting that right is subject to a constitutional prohibition on retroactivity.

691 Constitutional limitations, generally

The Federal Constitution and the large majority of state constitutions contain no express prohibition of laws which are retrospective in operation. In the absence of such an express constitutional inhibition, retrospective laws are not prohibited as such. Such laws cannot be held invalid unless they violate some other constitutional provision, such as the provisions relating to due process, equal protection of the laws, impairment of contractual obligations, or ex post facto laws. A retrospective law may also be invalid as amounting to an improper assumption of judicial power by the legislature, or as an impairment of vested rights.

It should be noted that, as a general rule of statutory construction, no provision of a statute will be construed so as to give it a retroactive effect unless such intent clearly appears from the act itself. Even then, legislative intent alone is not sufficient to require the retroactive application of a statute, since the retroactive application must also pass constitutional muster.

While constitutional impediments to retroactive civil legislation are modest, prospectivity remains the appropriate default rule; the presumption against retroactivity will generally coincide with legislative and public expectations, as it accords with widely held intuitions about how statutes ordinarily operate. In some instances there are explicit state constitutional prohibitions of retroactivity and in all instances there is a constructional policy against the retroactive application of legislation; generally, legislation that makes certain conduct unlawful cannot be applied to conduct that was lawful and completed before its enactment. Moreover, legislation having a retrospective aspect must be carefully scrutinized if its constitutionality is questioned, because of abuses which may result therefrom. Whether a statute which, by its express terms, is retroactive, will be sustained, has been said usually to be a question of degree. The fact that a statute is applicable to relationships which antedate its passage is not fatal to its validity, since there is no constitutional requirement that the status quo be maintained. Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, even though the effect of the legislation is to impose a new duty or liability based on past acts. Retroactive requirements are not in violation of any constitutional right if they are reasonable in their nature. Thus, there is authority to the effect that limited retroactivity which is not oppressive does not violate the Constitution.

692 Policy factors used to determine constitutionality

The policy factors to be considered in determining the constitutionality of retroactive legislation are the nature and strength of the policy interest served by the statute, the extent to which the statute modifies or abrogates the asserted pre-enactment right, and the nature of the right which the statute alters. For purposes of analyzing the constitutionality of retroactive legislation, the relevant inquiry is whether the legislation serves a legitimate legislative purpose that is furthered by rational means. A court must exercise special care when assessing retroactive legislation to determine whether its retroactivity is rationally and nonarbitrarily related to legislative goals. Retroactive legislation is constitutional so long as it effects a legitimate legislative purpose furthered by rational means; thus, while the retroactive aspects of legislation, as well as its prospective aspects, must meet the test of due process, that burden is met simply by showing that a retroactive application of the legislation is itself justified by a rational legislative purpose. Where a law has a retroactive effect, courts will also scrutinize the legislation more closely to examine whether the law is reasonably calculated to serve a compelling public interest and the extent to which retrospective application of it creates unfairness. Judicial review of retrospective legislation does not end with the inquiry generally applicable to economic regulation, i.e., whether legislation has a rational basis; instead, courts must balance a number of factors, including fairness to the parties, reliance on pre-existing law, the extent of retroactivity, and the nature of the public interest to be served by the law to determine whether the rights affected are subject to alteration by the legislature.

Caution: Absent some violation of specific constitutional provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.

693 Generally

Apart from its provisions respecting ex post facto laws, bills of attainder, and legislation impairing the obligation of contracts, the United States Constitution contains no express prohibition of retrospective legislation. Thus, prior to the enactment of the Fourteenth Amendment to the Federal Constitution, a retrospective law, unless falling within other constitutional inhibitions, could constitutionally operate to divest property rights. After passage of the Fourteenth Amendment, however, the protection afforded by the Due Process Clause was extended so as to prevent retrospective laws from divesting rights of property and vested rights.

There are three ways in which a rule can be impermissible as primarily retroactive -- if it impairs rights a party possessed when he or she acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed. Even now, federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Federal Constitution; so long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

694 Effect of Fourteenth Amendment

If a retrospective act which is neither an ex post facto law nor one impairing the obligation of a contract should nevertheless operate so as to take away a right of property, it may still be unconstitutional and void, not because it is retrospective, but by reason of its repugnancy to the Fourteenth Amendment of the Federal Constitution guaranteeing due process of law. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Obviously, no statute may be given an unconstitutional retroactive effect. Retrospective legislation is prohibited under the Fourteenth Amendment when it divests any private vested right or interest. But the Due Process Clause of the Fourteenth Amendment generally does not prohibit retrospective civil legislation, unless the consequences are particularly harsh and oppressive.

695 Generally

Although in the constitutions of a large majority of the states there are no constitutional provisions directly forbidding the enactment of retrospective laws, some state constitutions expressly prohibit, not only the passage of any ex post facto law or law impairing the obligation of contracts, but any statute retrospective in its operation.

696 Operation and effect of constitutional prohibitions, generally

A constitutional provision prohibiting retrospective laws covers laws which create a right where none before existed and which relate back so as to confer on a party the benefit of such right, and also all such laws as take away or impair any vested right acquired under existing laws, create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already past. The purpose of the constitutional prohibition against retroactive laws is to safeguard rights not guaranteed by other constitutional provisions such as the impairment of the obligation of contracts. A state constitutional proscription against retroactive legislation prohibits the impairment of vested rights, the creation of new obligations or duties, or the attachment of new disabilities with respect to past transactions. For example, the fixing of utility rates is a legislative function delegated by the legislature to a public utilities commission; therefore, rate making is subject to the constitutional prohibition against retrospective legislation.

697 Who is protected from impermissible retroactive legislation

A state constitutional provision barring the passage of retroactive laws protects only the rights of citizens; hence, a state may constitutionally pass a retroactive law which impairs its own rights, and the rights of municipalities in such states.

698 Legislation excepted from general rule

A prohibition against retrospective legislation is not violated by a proper exercise of the police power of the state -- that is, by the enactment of laws which, although they may operate directly on vested rights, are nevertheless promotive of justice and the general good. And the courts have recognized that, without violating a constitutional prohibition as to retrospective legislation, the state may make laws for the extenuation or mitigation of offenses, laws for the enforcement of existing contracts, and, in general, laws curing defects in the remedy, confirming rights already existing, or adding to the means of securing and enforcing them.

A statute is not retrospective in its operation within such a constitutional prohibition unless it impairs a vested right. The retroactive application of a statute is not necessarily unconstitutional, and is permitted when the statute effects a change that is merely procedural or remedial in nature. It is to be borne in mind, however, that even if a law is intended merely to effect changes as to remedy and procedure, if it in fact impairs vested rights it is invalid.

699 Generally

It frequently occurs in the consideration of questions of constitutional law that the validity of any particular statute may depend on the application of numerous principles and the weighing of conflicting interests and rights. This is well illustrated in the case of vested rights. A law may be unconstitutional through its retrospective operation, whereby it impairs vested rights. However, as long as the application of a new law does not burden a vested right, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give the new statute its intended scope. It may also be invalid as interfering with a fundamental right of property where the vested right is looked on as constituting such property. Even if the vested right is to be treated as property and one which cannot be impaired by retrospective legislation, it may be a right which is subject to regulation under the police power.

Finally, that which has been determined to amount to a vested right may be property which is subject to the guaranty of due process of law. The several principles of constitutional law bearing on the validity of such a statute may blend together, or at least they may not be clearly and separately stated by the judicial tribunals in applying them to particular situations. It is important that these distinctions be kept in mind as far as possible in consideration of the subject of retrospective legislation affecting or divesting vested rights.

700 Constitutional provisions

Legislation which impairs vested rights may be invalid as amounting to a taking of property without due process of law. Questions as to the constitutionality of laws affecting or impairing vested rights may be raised in several ways: (1) in inquiries as to whether such laws are prohibited in any degree by the Constitution of the United States; (2) in inquiries as to whether such impairment of vested rights amounts to retrospective legislation prohibited by state constitutions; and (3) in cases which hinge on the question whether such impairment of vested rights amounts to a violation of constitutional requirements as to due process of law.

The phrase "vested rights" is nowhere used in the Federal Constitution. This is also true in the majority of state constitutions. Nevertheless, statutes retrospective in their character and operation, directly affecting and divesting vested rights, are very generally considered as founded on unconstitutional principles, and consequently inoperative and void. Irrespective of any express constitutional prohibition as to the enactment of retrospective laws and, in consequence, laws

which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy vested property rights.

701 Generally; definition

The term "vested right" is not easily defined and has been used by the courts to express various shades of meaning. Generally speaking, "vested rights" is a term that is used to describe rights that cannot be taken away by retroactive legislation. For purposes of determining whether a law takes away or impairs a vested right acquired under existing law so as to render its application unlawfully retroactive, a "vested right" is one that is fixed, settled, absolute, and not contingent upon anything. The term is used to describe rights that cannot be taken away by retroactive legislation, since retroactive legislation affecting vested rights would constitute a taking of property without due process.

The term "vested rights" appears first to have been used in reference to real estate. It is defined as "an immediate fixed right of present or future enjoyment" and "an immediate right of present enjoyment, or a present fixed right of future enjoyment." Vested rights include not only legal or equitable title to enforcement of a demand, but also an exemption from new obligations created after the right has vested.

Rights are said to be vested in contradistinction to being contingent or expectant. A right is "vested" when there is an ascertained person with a present right to present or future enjoyment; it is "expectant" when it depends on the continuation of existing circumstances, such as the right of an heir to inherit, provided he or she survives his or her ancestor and the ancestor dies seised and intestate; and finally, is "contingent" when it depends on the performance of some condition or the happening of some event before some other event or condition happens or is performed. A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws. Only private, and not public, rights may become vested in a constitutional sense.

There can be no vested right in unlawful conduct. Moreover, no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.

The distinction between statutory privileges and vested rights must be borne in mind, for the citizen has no vested rights in statutory privileges and exemptions; the state may change or take away rights which were created by the law of the state, although it may not take away property which has vested by virtue of such rights. Whether the legislature in a particular situation acted beyond its power with respect to vested rights can only be determined from the nature of the alleged rights and the character of the change the legislature authorized.

702 Nature and origin

Vested rights may be created by the common law, by statute, or by contract. No matter how they are created, they are entitled to the same protection, and cannot be taken away without due process. The mere fact that the enactment of a statute may have been dictated by public policy does not preclude the acquisition of vested rights thereunder. And the failure to exercise a vested right before the enactment of a subsequent statute which seeks to divest it in no way affects or lessens such right. Still, there is, and can be, no vested right in an existing law so as to preclude its change or repeal.

A vested right may be one which has arisen by dedication or by escheat, or it may be one in the nature of a mere easement. It is also well established that a right acquired by adverse possession becomes vested, and is as fully within the protection afforded by the Constitution against legislative interference as any other, however acquired.

703 Absence of vested rights in existing law

There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor any vested right in the omission to legislate on a particular subject. There is no constitutional right to have all general propositions of law once adopted remain unchanged. In no case is there an implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. Every citizen in making his or her arrangements in reliance on the continued existence of laws takes on himself the risk of the laws being changed, and the state incurs no responsibility in consequence of the change proving injurious to his or her private interests. A right conferred solely by statute in the public interest may have accrued before the repeal or modification, but it does not follow that the accrued right in such cases is a vested right in the constitutional sense. A vested right, entitled to be protected from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of a demand, or a legal exemption from a demand made by another; and if before such rights become vested in particular individuals, the convenience of the state induces amendment or repeal of certain laws, these individuals

have no cause to complain. Nonetheless, a repeal or amendment of a statute which has the effect of extinguishing vested rights which have been acquired under the former law will be set aside.

704 Generally; legislative fiat divesting vested rights

Under the restraint which the Fourteenth Amendment to the Federal Constitution imposes upon retrospective legislation, as well as under the restraints imposed thereon by state constitutional provisions expressly prohibiting the enactment of retrospective laws, there can be no divesting of vested rights by legislative fiat. A state cannot by a mere act of the legislature take property from one person and vest it in another directly; nor can such property, by the retrospective operation of laws, be indirectly transferred from one to another. Pursuant to this general principle, retroactive declaratory statutes will not be allowed to affect vested rights; however, as long as the application of a new law does not burden a vested right, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give the new statute its intended scope. In addition, retroactive laws cannot change final judicial decisions as to the particular parties whose rights were adjudicated. Nonetheless, Congress has constitutional authority to overrule the United States Supreme Court retroactively, so long as vested rights are not affected.

705 Remedial legislation; rule of no impairment

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. The state has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence. Thus, a legislature may retroactively cure inequities in statutes as long as vested rights are not disturbed. Although the distinction between remedial procedures and impairment of vested rights is often difficult to draw, it has become firmly established that there is no vested right in any particular mode of procedure or remedy. Even the promulgation of a new jury trial rule would ordinarily not warrant the retrial of cases previously tried to a judge.

Statutes and court rules which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies or modes of procedure, are not within the general rule against retrospective operation. In other words, statutes effecting changes in civil procedure or remedy may have a valid retrospective application, and remedial legislation may, without violating constitutional guaranties, be construed -- assuming that such construction is in accord with its literal meaning -- to apply to suits on causes of action which arose prior to the effective date of the statute. A fortiori, an extraordinary remedy granted by the legislature and springing from no inherent right, may be altered or withdrawn without impairing vested rights. A statute which merely provides a new remedy, enlarges an existing remedy, or substitutes a remedy is not unconstitutionally retrospective, or violative of due process.

706 Effect on pending actions

As a general rule, where there is no direct constitutional prohibition, the legislative branch of government, whether federal or state, may pass retrospective laws, such as, in their operation, may affect suits that are pending and give to a party a remedy which he or she did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. Such acts are of a remedial character and are the proper subjects of legislation. Absent an express directive from Congress, a court must apply a newly enacted statute to pending cases unless doing so would give the statute a retroactive effect, that is, a court must determine whether the new provision attaches new legal consequences to events completed before its enactment. A "pending case" protected by a state constitution from being affected by an act of the legislature includes a taxpayer's request for a refund. A statute merely affecting the remedy may apply to, and operate on, causes of action which had accrued and were existing at the time of the enactment of the statute, as well as to causes of action thereafter to accrue, and to all actions, whether commenced before or after its enactment.

There is no vested right in particular rules of evidence, or in rules relating to jurisdiction of the court over parties to a lawsuit, and the legislature has full power to alter such rules and the degree of proof required in pending cases. Similarly, no one has a vested right in a measure of damages. Although the United States Supreme Court did hold that provisions of the Civil Rights Act of 1991, creating a right to recover compensatory and punitive damages for certain violations of Title VII, and providing for trial by jury if such damages are claimed, did not apply to a Title VII case pending on appeal when the statute was enacted, this would not appear to change the general rule that no ex post facto violation occurs because the state has enacted a different method of taking an appeal or other proceeding for a review.

One method by which a pending suit is sometimes affected is the repeal of the statute under which it was brought. It is clear that after such repeal no judgment can be rendered in a pending suit, because a case must be determined on the law as it stands at the time judgment is rendered, and the theory is that until the final decree is passed there is no vested right to be disturbed. It is beyond dispute that once a judgment has become final, Congress cannot pass legislation affecting the rights of parties to such final judgment or requiring its revision.

707 Curative legislation
Curative statutes are a form of retrospective legislation reaching back to past events to correct errors or irregularities and to render valid and effective attempted acts which would otherwise be ineffective for the purpose the parties intended, particularly irregularities in conveyancing requirements; they operate to complete a transaction which the parties intended to accomplish, but carried out imperfectly. A curative statute is necessarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings, except such as are jurisdictional or affect substantive vested rights, and also to cure or to give effect to contracts between parties which might otherwise be invalid for failure to comply with technical legal requirements. On the other hand, a curative statute cannot cure retroactively a failure to observe constitutional requirements. Thus, a curative act cannot operate to validate defects in proceedings which deprive a person of procedural due process. Nor may a curative act operate so as to deprive a property owner of his or her property without due process of law.

Although a retrospective statute, affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void, this doctrine does not apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, add to the means of enforcing existing obligations. This type of statute is valid when clearly just and reasonable and conducive to the general welfare, even though it might operate in a degree upon existing rights. A curative act may even be effective on pending litigation.
708 Terms and scope of constitutional guarantees; generally
The United States Constitution provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts," and many state constitutions contain a similar guarantee. Generally, the federal and state constitutional guarantees against the impairment of contractual obligations are interpreted essentially identically.

The underlying purpose of the Contracts Clause of the United States Constitution is to protect the expectations of persons who enter into a contract from the danger of subsequent legislation. However, the federal constitutional protection against the impairment of the obligation of contracts is no greater than other guarantees in the Constitution, and the constitutional prohibition of the passage of laws impairing the obligation of contracts cannot be construed to prohibit the exercise by the state legislature of its other constitutional powers.

The threshold inquiry in an impairment of contracts case is whether a state law has, in fact, operated as a substantial impairment of a contractual relationship. For purposes of a Contracts Clause analysis, a statute or ordinance can be said to substantially impair a contract when it alters the reasonable expectations of the contracting parties. Thus, legislation readjusting rights and burdens does not violate the Contracts Clause solely because it upsets otherwise settled expectations, even though the effect of the legislation is to impose a new duty or liability based on past acts. The total destruction of contractual expectations is not necessary for a finding of a substantial impairment of a contractual relationship for purposes of the Contracts Clause. The means by which a contract is impaired pursuant to state powers must not be arbitrary, unreasonable, or oppressive. In evaluating a claim that a change in state law violates the Contracts Clause, a court must determine whether a change has operated as a substantial impairment of the contractual relationship; when a substantial impairment is found, the state must then demonstrate a legitimate public purpose for the change, such as remedying broad and general social or economic problems.

Observation: If appropriate contractual conditions are met, one legislature may, under the Contracts Clause, bind a succeeding legislature to a particular course of action. For a statute to create a contract, the abrogation of which violates the contracts clause, the statute must be considered in its entirety and must clearly and plainly indicate the legislature's intention to surrender its sovereign power to alter and change the policy in the interest of the public's welfare.
709 Legitimate impairment as requiring public purpose
Any analysis of a Contracts Clause claim of impairment begins with a determination of whether a state law has, in fact, operated as a substantial impairment of a contractual relationship; the severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. However, where there is no existing contractual agreement regarding terms changed by the legislation, there is no need to consider whether there was in fact an impairment and whether it was substantial.

In order to resolve the question of whether a state law impairs a contractual obligation in violation of the United States Constitution, a court must determine whether there was a contract and whether the contract was impaired, and whether any impairment was reasonable and necessary to serve an important public purpose. The significant and legitimate pub-

lic purpose behind a regulation, justifying a substantial impairment of a contractual relationship, may be a broad general, social, or economic problem. But a statute exceeds the constitutional limitations concerning impairment of contracts if its effect on contractual rights is both substantial and is unwarranted by legitimate state interests.

710 To which governments and entities Contracts Clause is applicable

The federal constitutional provision regarding obligation of contracts is, by its very language, a limitation on the powers of the states only. This clause is generally held applicable to municipal and quasi-municipal corporations as well. However, the Impairment of Contracts Clause does not apply to the United States government, and neither it nor any other clause forbids the Congress or the Federal Government, when acting within the scope of their powers, to enact laws which may operate to impair the obligation of contracts. The Contracts Clause's prohibition upon the passage of state laws impairing the obligation of contracts refers only to the laws of a state, and not to judicial decisions, or to acts of the state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have been impaired. Legislation, however, does include any legislative action, including direct action by the people.

The guarantee against impairment of contract rights has been held to extend to the Virgin Islands, to the "local" government of the District of Columbia (although Congress itself is not subject to the Contracts Clause of the United States Constitution, even when legislating for the District of Columbia), and, by inference, to Puerto Rico.

711 Impairment as determined by federal or state laws

Whether a law violates the Contracts Clause of the Federal Constitution is a federal question. Thus, whether a state statute creates a contractual obligation for purposes of Contracts Clause analysis is a federal question, as to which a federal court cannot surrender its duty to exercise its own judgment, even if the question turns on issues of general or purely local law, though respectful consideration and great weight is accorded by a federal court to the views of the state's highest court. The question of whether a contract was made in the first place is also a federal question for purposes of a Contracts Clause analysis, although there is some dissent from this view. And federal rather than state law controls the question whether state statutes create contractual rights protected by the Contracts Clause of the Federal Constitution.

712 Nature of protected obligation; definition

For purposes of the constitutional protection against the impairment of contract obligations, the obligation of a contract is defined as the law or duty which binds the parties to perform their agreement. The obligation of a contract, protected by the federal and state constitutions, is not derived solely from the acts and stipulations of the parties independently of existing law, but has vitality and subsists apart from the stipulations expressed by the parties. Viewed from another standpoint, it consists in that which a person has undertaken to perform, and it is a legal, not a mere moral, obligation. Legislation substantially impairs a contract if it alters the contract's terms, imposes new conditions, or lessens its value.

It is for the courts, rather than an obligor, to determine the question when or whether the obligation of his or her contract may be enforced. Before a court can find impairment of a contract, it must find an obligation of the contract which has been impaired, and settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed.

713 Nonabsolute nature of bar

Although the text of the Contracts Clause in the United States Constitution would appear to bar any state legislation affecting the obligation of contracts, the courts have never applied the bar so broadly. The constitutional prohibition against impairment of contracts is not absolute, and it is not to be read literally; the primary focus of the Contracts Clause is upon legislation designed to repudiate or adjust pre-existing debtor-creditor relationships which obligors are unable to satisfy. Thus, the obligation of contracts provision does not bar a proper exercise of the state's police power or its power of eminent domain; and laws, both state and local, which unreasonably and unnecessarily impair the obligations of private contracts can be struck down as being unconstitutional. In other words, contracts may not be abrogated by the exercise of the state's police power unless it is for a public end and the result is reasonably adapted to that end with careful consideration of all circumstances and a clear showing that a public interest requires such abrogation. The constitutional prohibition against impairment of contractual obligations must be accommodated to the state's interest in safeguarding the welfare of its citizens, and states must be allowed to exercise a broad police power to enact general regulatory measures without fear that private contracts will be impaired or even destroyed as a result. A court's task is to balance the competing private and public interests at stake when a state seeks to adjust existing contractual relationships. In short, the reservation of the essential attributes of sovereign power is read into contracts as a postulate of the legal order.

714 Effect of existing laws

The constitutional right to contract is not without bounds, but is confined by existing law; thus, the application of a regulatory statute that is otherwise valid may not be defeated by private contracts. In conformity with the well-established rule that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe. In other words, laws that are in force at the time that parties enter into a contract are merged with other obligations that are specifically set forth in the agreement and legally do not impair the contract under the Contracts Clause. There can be no other standard by which to ascertain the extent of the obligation than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the existing law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force.

The Contracts Clause of United States Constitution applies only to laws with retrospective, not prospective, effect. Thus, a new nonretroactive statute affecting private contracts is a statute that affects only future contracts; therefore, such a statute does not violate the Contracts Clause. The law which thus establishes the obligation of a contract is not general or universal law, but the law of the jurisdiction in reference to which the contract is made.

It is to be noted that an immunity from a change of general rules of law will not ordinarily be implied as an unexpressed term of an express contract. Not only is the existing law read into contracts in order to fix their obligations, but the reservation of the central attributes of continuing sovereign or governmental power is also read into contracts as a postulate of the legal order. And if the parties assent to being bound by any subsequent amendments of an existing statute which may be pertinent and applicable to their contract, then the passage of such an amendment does not impair the obligation of their contract.

715 Inclusion of remedies

It is a fundamental principle of constitutional law in reference to the obligation of contracts that not only the laws in force at the time of making a contract, but also the right to a remedy enter into and form a part of it as if they were expressly referred to or incorporated in its terms, and that such remedies likewise constitute a part of its obligation. This principle embraces alike those laws which affect its validity, construction, discharge, and enforcement.

The remedy which is protected by the Contracts Clause of the Constitution is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of the contract. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are therefore inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.

716 Contracts covered by Impairment Clause; generally

The term "contract" is used in its ordinary sense in the clause of the United States Constitution forbidding state legislation impairing the obligation of contracts. Hence, a contract which is not contrary to public policy and is formed between parties competent to contract is a contract which is constitutionally protected against hostile legislation, unless the legislation can be justified as serving an important public purpose.

The Constitution does not discriminate in any way between different kinds or classes of contracts. By its terms and its spirit, it comprehends and takes under its protection all valid contracts of every description, whether executed or executory, written or verbal, express or implied. It includes contracts to which the state is a party. However, that class of obligations styled "quasi-contracts" is not embraced within the constitutional guarantee against the passage of a law violating the obligation of a contract. And the provision prohibiting the states from passing laws impairing the obligation of contracts has never been understood to embrace contracts other than those which respect property or some other object of value and confer rights which may be asserted in courts of justice. Constitutional protection does not extend to contracts which relate to rights which are not rights of property, but instead are governmental or political rights and privileges, as, for example, a grant of a public right or privilege.

717 Requirement that contract rights at issue be vested

Only those contracts in which the parties have a vested beneficial interest are the objects afforded protection by the Impairment of Contracts Clause of the Federal Constitution. Contingent or speculative contracts or rights are not within the protection of the constitutional guarantee.

718 Invalid or illegal contracts

Since the obligations which the Constitution of the United States protects from impairment are such as exist by reason of contract, it follows that as a basis for invoking the rule there must be a valid contract possessing the essential elements of assent and good consideration; and such contract must be clearly proved before the protection of the Federal Constitution may be invoked. The Federal Constitution does not protect contracts which are invalid, illegal, contrary to public policy, or nudum pactum. although state or municipal contracts held invalid by a court may be validated by the subsequent passage of legislation indicating a clear intent on the legislature's part to render such contracts valid. That which is not an enforceable contract right is not an obligation which can be impaired within the meaning of the constitutional prohibition. A contract which rests on an unconstitutional statute is itself void and creates no obligation to be impaired by subsequent legislation.

719 Future contracts

Although a statute tending to impair the obligation of a contract is inoperative as to contracts existing at the time of its passage, it may nevertheless be valid and operative as to future contracts, or as to rights under an existing contract where such rights are not yet vested. The provision of the Constitution which declares that no state shall pass any law impairing the obligation of contracts does not apply to a law enacted prior to the making of a contract the obligation of which is claimed to be impaired, but only to a statute of a state enacted after the making of the contract. Thus, application of an amended attorney's fee statute to a suit filed after the amendment was enacted would not be an unconstitutionally retroactive impairment of a contractual obligation. The obligation of a contract cannot properly be said to be impaired by a statute in force when the contract was made, for in such cases it is presumed that it was made in contemplation of the existing law.

720 State and other public contracts

The state and federal constitutional prohibitions against legislation impairing the obligation of contracts applies to contracts with states (such as state contracts with individuals and corporations), limiting the power of the states and their political subdivisions to modify their own contracts with other parties. The courts will closely scrutinize state statutes affecting public contracts to make certain that the state is not attempting to escape from its own financial obligations in violation of the Contracts Clause. However, a contract entered into between the state and an individual "subject to law" permits the state to rescind such contract without impairing the obligation thereof. Furthermore, absent an adequate expression of actual intent of the state to bind itself, the United States Supreme Court will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the state is a party.

Observation: State and federal constitutional impairment-of-contracts clauses are not absolute bars to subsequent modification of the state's own financial obligations. For purposes of state and federal constitutional impairment-of-contracts clause challenges regarding the state's own financial obligations, as with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.

Also within the constitutional guarantee against impairment are contracts by one state with another, and contracts between a state and the United States, as well as contracts entered into by municipalities, counties, and other governmental entities. It has, however, been held that contracts between a state and one of its own municipalities are not protected by an impairment clause, because of the status of municipalities as subdivisions or creations of the state.

Practice guide: When examining a legislative modification of a state's own financial obligations under an impairment-of-contracts clause, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake. "Self-interest," in this sense, refers to the state's interest as a party to the contract, rather than to its interests as a sovereign seeking to further important public policies.

721 State and municipal public employment, retirement, and pension contracts

The Impairment of Contracts Clause apply to state contracts relating to public employment, retirements, and pensions. An implied-in-fact unilateral contract implicating the Contracts Clause is formed by a legislature's manifestation, through the language and circumstances of a pension statute, of its intent to enter into a bargain with its employees, whereby the state provides them pension benefits in exchange for their loyal service and monetary contributions over a long period of time.

Observation: Medical benefits may be a form of deferred compensation, and thus a public employee may have a vested right to receive those benefits, such that any attempt to interfere with the right would be an unconstitutional impairment of the contract.

While public employees' pension benefits are contractual, under certain circumstances the government may unilaterally modify them so long as the changes do not adversely alter the benefits, or, if the benefits are adversely altered, so long

as they are replaced with comparable benefits. Thus, the Impairment of Contracts Clause precludes application of an amendatory statute or ordinance in the calculation of public employees' retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable; if an employee performs services during the effective dates of certain legislation, his or her benefits are constitutionally vested, precluding their legislative repeal as to that particular employee.

Observation: Despite the foregoing, retirement plans may be changed or decreased prospectively.

Where a public employee has retired under the terms of a retirement benefit contract, his or her rights under the contract are fixed at the time of the retirement, and he or she is not entitled to subsequent statutory increases in retirement benefits in the absence of a statute specifically so stating or in the absence of a retirement contract provision specifically calling for the payment of such increases. Any attempt to reduce or terminate benefits for government employees that are established by a statute or ordinance is prohibited by the Impairment of Contracts Clause of the Constitution, but where the statute itself provides that it is subject to legislative change, it may be amended, as no vested right to unchanged benefits is created.

Caution: Such rules do not apply to Congress and do not cover laws enacted by Congress for the District of Columbia.

722 Emergency actions affecting government contracts

It has been held that in unusual emergency situations, such as where a governmental unit has declared itself bankrupt, the governmental unit's unilateral action to impair its contracts with its employees and other parties will be upheld if the declared emergency is based on an adequate factual foundation; the agency's action is designed to protect a basic social interest and not benefit a particular individual, the law giving rise to the impairment at issue is appropriate for the emergency and obligation, and the agency's decision is temporary and limited to the immediate exigency that caused the action. Thus, a city's salary reduction plan, instituted in response to a budgetary shortfall, did not violate the Contracts Clause, even though the city substantially impaired an extant contract with its teachers and police by approving the plan. The impairment was an exercise of the city's legitimate powers and was thus permissible, considering that the city clearly sought to tailor the plan as narrowly as possible and that the salary reductions were reasonable under the circumstances. The fact that a state insurance commissioner's rule to regulate insurance practices was determined to be a needed response to an emergency situation, was enacted to protect a societal interest in maintaining insurance without arbitrary deprivation, was precisely tailored to meet an existing emergency, imposed reasonable conditions upon insurers consistent with the statute, and was initially limited in duration until a new rule was adopted by normal administrative procedures foreclosed the insurers' contention that the rule unconstitutionally impaired contractual obligations in violation of the Impairment Clause. On the other hand, a public employees salary deferral program, implemented under a New York law under which affected executive branch employees received only nine-tenths of their salaries for each of five biweekly periods, was held to be an unconstitutional impairment of contract, notwithstanding the fiscal crises New York was in and notwithstanding the fact that the burden was spread rather broadly, inasmuch as the program was not reasonable and necessary in that other alternatives existed. And a statute effecting a five-day lag of payroll upon both represented and unrepresented nonjudicial employees so as to offset the state's budget shortfall was invalid as a violation of the Contracts Clause of the United States Constitution, since the impairment of the contract was substantial and could not be justified as a legitimate means of alleviating the state's fiscal crisis.

Observation: Although an emergency is not necessary to justify impairment of a contract, extreme modifications are typically upheld under a Contracts Clause analysis only in the face of emergency or temporary situations.

723 Statutes and ordinances

In determining whether a particular statute gives rise to a contractual obligation subject to unconstitutional impairment, it is of first importance to examine the language of the statute. Absent an adequate expression of actual intent to create a contract, that which is undoubtedly a scheme of public regulation will not lightly be construed to be, in addition, a private contract to which the state is a party. Although it may be taken as a general rule that rights conferred by statutes or ordinances are presumed not to be contractual in their nature so as to prevent their alteration or abrogation, this presumption can be overcome if language in the statute and other indicia show that the legislature intended to bind itself contractually. A legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; rights may accrue under a statute, or even be conferred by it, of such character as to be regarded as contractual, and such rights cannot be defeated by subsequent legislation or inadequate funding by the state. In general, a statute is treated as a contract only when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against

the state; in addition, statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis.

Contracts established by the acceptance of ordinances come within the protection of constitutional prohibitions of the enactment of laws impairing the obligation of contracts. The creation of municipalities is regarded as a political act; thus municipal charters are not contracts within the meaning of the Impairment Clause. Similarly, statutes relating to counties, Similarly, statutes relating to public improvement districts, school districts, and public corporations do not generally fall within the constitutional prohibition. Also, appointment to and tenure of an office created for public use, and regulation of the salary affixed to such office, do not come within the import of the term "contracts," intended to be protected by the United States Constitution.

724 Legislative grants and privileges

A legislative grant under which rights have vested amounts to a contract, and a subsequent statute attempting to impair or annul such grant, is unconstitutional because it is a law impairing the obligation of contracts. Thus, if a state makes a grant absolute in terms and without any reservation of a right to alter, modify, or repeal it, this constitutes an executed contract, and the state is forbidden to pass laws impairing the obligation arising therefrom. The same rule is fully applicable to grants embodied in municipal enactments. No obligation of contract is impaired by alteration of a conditioned grant, or by the grant of an additional benefit, as no impairment exists under the latter circumstance.

On the other hand, it is also the rule that the legislature has the power to take away by statute that which has been given by statute except when to do so would obviously amount to the impairment of a vested right. The recall of such a privilege is not an impairment of the obligation of contracts. So, until a general power granted to corporations has been exercised, the terms and conditions under which it may be exercised are subject to legislative control. Provisions granting such a right or power to a corporation do not partake of the nature of a contract, and the revocation of such a privilege at any time before it is acted upon does not amount to impairment in a constitutional sense. However, once acted upon, a corporate charter is a contract entitled to protection under the Constitution, and it may not be amended or repealed without the consent of the corporation or its members unless such right was reserved by the legislature. But the doctrine that a corporate charter is a contract which the Constitution protects against impairment by subsequent legislation is limited in the area of its operation by the equally well-settled principle that a legislature can neither bargain away its police power nor in any wise withdraw from its successors the power to take appropriate measures to guard the safety, health, and morals of all who may be within their jurisdiction, and thus the powers or privileges of a private corporation, although not subject to direct impairment, may nevertheless be affected by the operation of certain governmental powers, such as exercise of the police power and the power of eminent domain.

725 Private contracts, generally

The federal constitutional prohibition against impairment of contractual obligations applies not only to contracts by a state or other public body, but also to those entered into between private individuals or parties.

Practice guide: When a state acts to impair a purely private contract, that is, one to which it is not a party, the courts ordinarily will properly defer to legislative judgments as to the necessity and reasonableness of the particular measure.

Contracts made by public service corporations for their services or products, because of the interest of the public therein, are not to be classed with personal and private contracts, the impairment of which is forbidden by constitutional provision. While, generally speaking, marriage is a contract, it is not such a contract as is contemplated by constitutional provisions prohibiting legislation impairing the obligation of contracts. For the same reason, state laws in regard to divorce are held not to come within the constitutional prohibition. Likewise, statutes abolishing actions for breach of promise of marriage, seduction, and the like, are not unconstitutional as impairing the obligation of contracts.

726 Generally

It is a fundamental rule that a state by the act of its legislature cannot alter the nature and legal effect of an existing contract, to the prejudice of either party, or give to such contract a judicial construction binding on the parties or the courts. This rule is founded on two distinct principles of constitutional law: (1) that of prohibiting the assumption of judicial power by the legislative department of government; and (2) that of inhibiting the impairment by a state of the obligation of contracts. The first is based on the doctrine of the separation of the powers of government. The second of these principles, that is, the importance of protecting the obligation of contracts from all legislative action tending to its impairment, has caused the courts to emphasize that the inviolability of contracts and the duty of performing them, as made, are at the foundation of a well-ordered society, that to prevent the removal or disturbance of these foundations is one of the great objects for which the Constitution was framed, and that it is one of the highest duties of a court to take care that the prohibition should neither be evaded nor frittered away.

The Impairment Clause is usually liberally construed. Moreover, various court decisions put it beyond question that the prohibition is not to be an absolute one and is not to be read with literal exactness like a mathematical formula; it prohibits unreasonable impairment only. Thus, not every modification of a contractual promise impairs the obligation of contract under federal law, any more than every alteration of existing remedies violates the Contracts Clause, and it is now recognized that obligations, as well as remedies, may be modified without necessarily violating the Contracts Clause. Not only is the Contracts Clause of the Federal Constitution qualified by the control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to a legitimate end has the result of modifying or abrogating contracts already in effect, since contracts are to be regarded as having been made subject to the future exercise of the constitutional power of the state, and the reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. A finding that there has been a technical impairment is, therefore, merely a preliminary step in resolving the more difficult question whether such impairment is permitted under the Constitution, and the court must attempt to reconcile the strictures of the Contracts Clause with the essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens.

Of course, the power of a state to modify or affect the obligation of contract is not without limit. The Contracts Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation. Whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power, and the scope of the state's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other.

The Contracts Clause of the United States Constitution limits the power of the states to modify their own contracts as well as to regulate those between private parties, but the clause does not prohibit the states from repealing or amending statutes generally, or from enacting legislation with retroactive effects, unless such a law, when applied retroactively, will impair the obligations of a contract or divest or impair vested rights. Under the Contracts Clause, a state is not required to adhere to a contract that surrenders an essential attribute of its sovereignty.

727 Tests of impairment; generally

In determining whether state legislation unconstitutionally impairs contract obligations, no unchanging yardstick can be fashioned, applicable at all times and under all circumstances, by which the validity of each statute may be measured and determined, but every case must be determined upon its own circumstances. The Contracts Clause of the Federal Constitution operates only to invalidate state legislation relieving the commitments of one party to a contract or otherwise retroactively altering the rights and obligations under existing contracts. Yet, the question whether or not a law impairs the obligation of a particular contract is not always susceptible of an easy solution. To have impairment of a contract in violation of the Contracts Clause, the law has to act on the contract itself, as distinguished from the subject matter of the contract. The prohibition against impairment of contracts is not an absolute one and is not to be read with literal exactness like a mathematical formula; and a statute does not necessarily impair a party's rights under the Contracts Clause unless it adversely affects that party's reasonable expectations under the contract. No matter how severe the impairment, a state regulation which does no more than restrict a party to the gains it reasonably expected from the contract does not necessarily constitute a substantial impairment within the meaning of the Contracts Clause.

The courts from time to time have announced certain tests and principles serving as guides in determining the validity of statutes attacked as impairing the obligation of contracts. The broad principle has been stated that the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts is intended to prohibit every mode or device having such purpose; the prohibition is universal and therefore no attempt is made in that instrument to enumerate the modes by which contracts may be impaired. On the other hand, the federal constitutional prohibition against contract impairment does not exact a rigidly literal fulfilment. Rather, it demands that contracts be enforced according to their just and reasonable purport. Thus, legislation which impairs the obligations of private contracts is normally tested under the Contracts Clause by reference to the "rational basis test," that is, whether the legislation is a reasonable means to effect a legitimate public purpose.

To "impair" is defined as to make worse, to diminish in quantity, value, excellence, or strength, or to lessen in power or weaken. More specifically, the obligation of contract guarantee is impaired when a party is deprived of the benefits of

his or her contract, or when the statute takes from the party his or her whole contract and all the rights which it was intended to confer. The threshold inquiry of any Contracts Clause analysis is whether the challenged statute has in fact operated as a substantial impairment of a contractual relationship.

Any law which changes the intention and legal effect of the original parties, giving to one a greater or the other a lesser interest or benefit of the contract, impairs its obligation. In other words, the obligation of a contract is impaired when the legislative enactment changes the obligation in favor of one party against another, either by enlarging or reducing the obligation. Thus, in order for a statute to offend the constitutional prohibition against the enactment of laws impairing the obligation of contracts, the statute must have the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts.

The repeal of a law which constitutes a contract is an impairment of its obligation. But contracting parties cannot be heard to complain on constitutional grounds if the legislature takes steps to see that they get no more than that which they contracted for. Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contracts Clause, notwithstanding that they technically alter an obligation of a contract. And a statute, to be within the scope of this clause, must act on the contract itself as distinguished from the property which is the subject of the contract.

728 Degree or extent of impairment

Under the Contracts Clause, the severity of the impairment of an obligation of contract "measures the height of the hurdle" that state legislation must clear. The Contracts Clause does not bar all impairments of contract; it bars only unreasonable, significant impairments. When a government enacts legislation affecting an impairment of existing contracts, it must use the least intrusive means to achieve its goals; it is not free to impose a drastic impairment of private contractual relationships when an evident and more moderate course would serve its purposes equally well. Although any alteration of a contract, however unimportant, and even though manifestly for the interest of the objecting party, technically impairs its obligation, the large majority of courts now hold that an impairment may be ignored where it is minimal in its effect. However, even a minimal impairment of contractual expectations violates the Contracts Clause where there is no real exercise of the police power to justify the impairment.

Total destruction of contractual expectations is not necessary for a finding of substantial impairment in violation of the Contracts Clause. The validity of a retroactive statute under the "Contracts Clause" depends upon its reasonableness, considering the nature and strength of the public interest, the extent of modification of the asserted pre-enactment right, and the nature of the right altered by the statute; whether it relates to the validity, construction, duration, discharge, or evidence of the contract -- all cases the conclusion is the same.

729 Degree or extent of prior state regulation

In determining the scope of impairment of a contract, a reviewing court must weigh the extent of the previous state regulation of the particular field of commerce in which the contract operates. In a heavily-regulated industry, a government action will not violate the federal constitutional Contracts Clause if legitimate and significant purposes support the law. However, prior regulation of an industry as a whole does not necessarily preclude every claim that subsequent legislation unconstitutionally impairs pre-existing contractual obligations.

A court must look to the nature as well as the act of regulation to determine whether an industry has been sufficiently regulated in the past to pre-empt a Contracts Clause challenge. The prior regulation must share more in common with the challenged legislation than merely the industry in which it operates in order to bar a subsequent finding of substantial impairment under the Contracts Clause. In such cases, the complainant may be required to demonstrate that the challenged legislation gives rise to an impairment of overriding severity. On the other hand, new legislation may constitute a violation of the Impairment Clause when applied to industries never before, or only lightly, regulated, especially where such legislation cannot be justified as necessary for the public interest. The same rule applies in the case of closely regulated professions. And a party that purchases a company in an industry that is already regulated in the particular to which the party objects normally cannot prevail on a Contracts Clause challenge to state law, as the regulation of the company's contracts is foreseeable.

730 Diminution of value of contract

The test of impairment may be met by showing that the value of a contract has been diminished and substantially impaired.

731 Diminution of means of enforcement

Whenever a law is so changed that the means of enforcing the duty imposed by a contract are materially impaired, the obligation of the contract no longer remains the same. Thus, a change in the law which seriously interferes with the enforcement of a contract is an impairment thereof, unless the diminution is based on public policy or is in the public interest.

It is a difficult question to determine when a statute operating upon the remedy impairs the obligation of contract, and for purposes of the federal constitutional Contracts Clause, the contractual relationship of creditor and debtor is not considered to be substantially impaired by later legislation compromising or eliminating a creditor's right to enforcement of the contract through the remedy of judgment and levy against specific unsecured property of the debtor unless that right otherwise had a substantial value to the contractual relationship at the time the legislation was enacted.

Generally speaking, laws which add to a means of enforcing existing obligations are held not violative of the Contracts Clause.

732 Generally

Under the constitutional provisions prohibiting the enactment of laws impairing the obligation of contracts, the question as to what constitutes a "law" assumes significance. Any enactment, from whatever source it originates, to which a state gives the force of law is a "law" within the meaning of the federal constitutional provision. This includes state statutes and constitutions, and acts of state agencies, and, in some cases, congressional legislation. It also includes municipal ordinances, and direct action by the people. On the other hand, the constitutional prohibition against the passing of laws impairing the obligation of contracts does not extend to the decisions of courts embodying general rules of law. And it has been held that among others, resolutions of a park commission, a board of trade, and a port authority are not "laws" within the meaning of the Contracts Clause.

733 Federal laws

As pointed out earlier, the Impairment Clause in the Federal Constitution is not a limitation on the powers of Congress, and where a private contract is impaired by a federal statute, judicial scrutiny is quite minimal. However, the Due Process Clause prohibits federal legislation which impairs rights vested under contracts.

Practice guide: To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality has the burden of demonstrating, first, that the statute alters contractual rights or obligations; if an impairment is found, a reviewing court next determines whether the impairment is of constitutional dimension, and if the alteration is minimal, the inquiry may end at that stage, but if the impairment is substantial, a court must look more closely at the legislation. When the contract is a private one, and when the impairing statute is a federal one, this inquiry is especially limited, and judicial scrutiny quite minimal; the party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.

A law of Congress not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

On the other hand, contracts, however express, which deal with a subject matter which lies within the control of the constitutional authority of Congress, cannot fetter such authority. Hence, as examples, the obligation of contract is not impaired by an act of Congress passed pursuant to, and in accord with, the Interstate Commerce Clause or Congress' power to control certain aspects of the military. Furthermore, it is on this principle that Congress has the power to enact a bankruptcy law under which debtors may be discharged from debts existing at the time of the enactment of the law, while the power of the states in this respect is limited to the discharge of subsequent debts. Similarly, the obligation of private contracts for the payment of money is subject to the exercise of the power vested in Congress over the monetary system, with the result that Congress has the power to invalidate the provisions of private contracts for the payment of gold coin.

734 State laws and constitutions; acts of state agencies

In order to come within the Contracts Clause, not only must the obligation of a contract be impaired, but it must be impaired by an enactment of the state after the contract has been entered into. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

Observation: For purposes of determining whether a change in state law violates the Federal Constitution's Contracts Clause (Art. I, ß 10, cl. 1), which prohibits state laws that impair the obligation of contracts, the United States

Supreme Court generally inquires: (1) whether there is a contractual relationship; (2) whether a change in the law impairs that contractual relationship; and (3) whether the impairment is substantial.

Regardless of the intent of the legislature, a statute may not, constitutionally, alter, amend, or impair substantial rights of the parties to an existing contract. Any enactment, regardless of its source, to which a state gives the force of law is a law within the meaning of this provision, and this includes acts of the legislature, municipal ordinances passed pursuant to legislative authority, rules and orders by an instrumentality of the state exercising delegated authority, and state constitutions and constitutional amendments.

Observation: The fact that a new statute's underlying purpose may be just and equitable does not authorize its retroactive application to a pre-existing contract when to do so would contravene the contract Impairment Clause.

735 Ordinances

Generally speaking, a municipal ordinance is a legislative act within the purview of the Impairment Clause of the Federal Constitution.

736 Judicial decisions

The Contracts Clause of the Federal Constitution is directed only against impairment by legislation, and not against the judgments of courts. Although a contract may, according to the decisions, at the time it is entered into, be valid by virtue of the construction of a statute or otherwise, it is not unconstitutionally impaired, in violation of this provision of the Federal Constitution or like provisions in state constitutions, by a change in those decisions rendering it invalid. There is no vested right in the decisions of a court, and a change in the decisions of a state court does not constitute the passing of a law, although the effect of such change is to impair the validity of a contract made in reliance on prior decisions.

737 Rule that alteration of remedies is permissible

The Federal Constitution's prohibition of legislation impairing the obligation of contracts is applicable to, and prohibitive of, legislation which effects impairment either by acting directly on the contract itself or by acting on the remedy; nothing is more material to the obligation of a contract than the means of its enforcement. Thus, a diminution of the means of enforcement of a contract constitutes an impairment of the obligation of the contract within the meaning of the constitutional prohibition. It is not always unconstitutional, however, for changes in statutory remedies to affect pre-existing contracts. In fact, where a statute merely alters the remedy available to a party, retroactive application of the statute normally will not violate the Contracts Clause. Thus, for example, the retroactive application of comparative negligence principles to a state products liability statute was held not violative of the prohibition against state impairment of contracts. During the early years when the Contracts Clause was regarded as an absolute bar to any impairment, this result was reached by treating remedies in a manner distinct from substantive contract obligations. Yet it was also recognized very early that the distinction between remedies and obligations was not absolute. Impairment of a remedy was held to be unconstitutional if it effectively reduced the value of substantive contract rights. More recent decisions have not relied on the remedy/obligation distinction, primarily because it is now recognized that obligations as well as remedies may be modified without necessarily violating the Contracts Clause. Consequently, it is now established beyond question that remedies, within certain limits, may be altered or modified, according to the will of the state, even though such statutes in certain cases may have a retrospective effect and to some extent incidentally affect vested rights, provided that a substantial means for enforcement remains and that the change of remedy is reasonable. And a similar alteration of remedy may be effected by a constitutional provision. The contract clauses of the federal and state constitutions do not preclude the legislature from passing laws which impose new procedures on the enforcement of substantive rights under a contract, and it is to be assumed that the parties make their contracts with reference to this power of the state. Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is obnoxious to the Constitution and will not be upheld, and no changes in remedies that materially lessen the value of an agreement or that abridge, obstruct, or unreasonably delay rights thereunder will be permitted.

The power of the legislature to legislate with respect to remedies is not unlimited. Thus, the legislature may not so circumscribe an existing remedy with conditions and restrictions as seriously to impair the value of the right. And while a state is free to regulate the procedure in its courts even with reference to contracts already made, and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved, a different situation is presented when extensions are so piled up as to make the remedy a shadow, and a statute attempting so to regulate extensions is void as impairing the obligation of contract.

738 Abrogation and substitution of remedies

While the legislature may not withdraw all remedies, or the only existing remedy, and thus in effect destroy a contract, the modes of procedure in the courts of a state are so far within the legislative control that a particular remedy existing

at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. The abrogation or substitution of remedies may be accomplished even though the new or the remaining remedy is less convenient than that which was abolished, or less prompt and speedy.

A legislative act declaring certain existing rights unenforceable after a fixed date in the future is not unconstitutional as impairing the obligation of a contract, if the date so fixed provides a reasonable time for the institution of proceedings for the vindication of such rights. And a statute temporarily denying a remedy, and operative only for a reasonable time, does not impair the obligation of contracts, especially where enacted to combat existing evils and to prevent worse or more extensive evils.

739 Curative statutes

It is a general rule that the legislature has power, in the absence of any inhibiting constitutional limitation, to pass a curative statute to correct errors or informalities in deeds, mortgages, and other instruments defectively executed or acknowledged where the rights of third parties which have been acquired in good faith are saved, or to correct defects in statutes, inasmuch as no impairment of the obligation of contracts is necessarily effected by such curative laws.

740 Tests and operation of rule

While it is conceded that a distinction exists between alterations of the remedy which are deemed to be legitimate and those which, under the form of modifying the remedy, impair substantial rights, generally speaking, the difficulties of stating a rule render it imperative that every case be determined on its own particular circumstances and the question whether, in the last analysis, a change of remedy impairs a substantial right is ordinarily one as to reasonableness. Whether changes affect the right is, in the end, a matter of degree, as to which there can be no rules.

One general test states that the obligation of a contract is impaired where the remedy is taken away or abolished, the legal obligation is diminished, suspended, or destroyed by relaxing or abolishing the legal remedy, or the proceedings for enforcement are burdened with new conditions or restrictions. A more particular test frequently advanced is that only such repeals or changes of any of the remedies existing as to the enforcement of a contract as serve to lessen the value of the agreement or which substantially interfere with, abridge, obstruct, or unreasonably delay rights thereunder impair the obligation. And even where there is a clear impairment of an obligation of a contract, the same may be justified upon a clear showing that a public interest is involved.

741 Stipulated remedies as exceptions to rule

Frequently, parties, in executing a contract, stipulate in the body of the contract what remedy is to be pursued in the event of a breach. In such cases the remedy agreed upon becomes a part of the obligation of contract and any subsequent statute which affects the remedy impairs the obligation and is unconstitutional. The effect of such a specific reference to, and incorporation of, such remedies is to deny to the legislature some of the power which it might otherwise have over the alteration and substitution of remedies; and when a contract is made stipulating for a specific remedy, it cannot be modified by subsequent legislation requiring the parties to pursue a different remedy, even though in the stipulation as to the remedy the directions of the statute are disregarded. Similarly, where a state enters into a contract with a private individual, it is competent for the parties to provide, as a substantive part of the contract, special remedies for the enforcement of their respective obligations, and in such a case neither party may, without the consent of the other, resort to any form of remedy other than those stipulated for.

742 Generally

The Contracts Clause is not an absolute bar to the subsequent modification of a state's own financial obligations; as with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose, although in applying such a standard, complete deference to a legislative assessment of reasonableness and necessity is not appropriate, since the state's self-interest is at stake. An impairment of a state's own financial obligations is constitutional under the Contracts Clause of the United States Constitution if the impairment is reasonable and necessary to serve an important public purpose; the extent of impairment is a relevant factor in determining its reasonableness. But a state is not completely free to consider impairing the obligation of its own contracts on a par with other policy alternatives, and is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.

A state entering into contracts lays aside its attributes of sovereignty and binds itself substantially as one of its citizens does when he or she enters into a contract. While a state has no power to annul its own contracts, under certain circumstances it has the power of defeating a contract because of its immunity from suit instituted by individuals. The legislature may avoid payment of the obligations of the state by failure or refusal to make the necessary appropriation, not-

withstanding that the same body cannot impair the obligation of the contract; but after an appropriation has been made, the state cannot withdraw such appropriation where this would amount to the impairment of the obligation of its contract. [n32]

A state has the same power as an individual to break its contracts, and although it has made a contract to do a particular thing, it may abandon it and in such case the obligation of the contract would not be impaired by the refusal of the state to perform it. The other party to the agreement would have a just claim against the state for any damages sustained in like manner as if the contract had been between individuals. This principle is justified on the basis that the breach of a contract by the state does not impair its obligation, but that the state merely has immunity from suit. The only remedy available in the absence of statute is through an appeal to the legislature, which fact is known to the claimant at the time of entering into the contract with the state. However, while a state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contract may be judicially resisted; and any law impairing the obligation of the contracts under which such property or rights are held is void.

A law authorizing suits in behalf of the state for the assertion of its title to property does not impair any contract rights that a party thus proceeded against may have in the subject matter, and consequently an adjudication for the state is not reviewable in the United States Supreme Court by the defendant on the ground that the statute authorizing the suit violates the Contracts Clause of the Constitution.

Where one state enters into a statutory covenant with another state, as part of bi-state legislation authorizing involvement in a joint project, state legislation which attempts to retroactively repeal the statutory covenant violates the Contracts Clause of the United States Constitution.

743 Withdrawal of right of action against state

By virtue of the doctrine of sovereign immunity, no action can be brought against a state without its consent. Accordingly, although a state is forbidden to impair the obligation of a contract entered into by it, a private citizen cannot bring suit against the state. Even if the state, at the inception of the contract, consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity or may subsequently prescribe additional conditions for bringing suit against it. A rightful judgment against a state, on the other hand, gives a vested right which cannot be taken away by a repeal of the statute which authorized the state to be sued.

In those cases where a state permits an action against itself, the court is practically acting as an auditing board; and if funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them. There is no remedy for the enforcement of the contracts of the state that may not, under the Constitution of the United States, be taken away by a law of the state. In exercising this power, the state violates no contract with the parties; it merely regulates the proceedings in its own courts.

744 Generally

While there are usually some specific exceptions, it may be stated very broadly that the obligation of a contract is not unconstitutionally impaired by the adoption, amendment, or repeal of statutes relating to such matters as interest rates and usury, executions against wages, earnings, or salaries, deficiency judgments relating to real property sold on execution, redemption from judicial or tax sales, insolvency, and mechanics' liens.

745 Federal constitutional provisions; Article IV, ß 2, and Fourteenth Amendment

Reflecting the principle that the enjoyment of the constitutional privileges and immunities by the citizens of each state in every other state is manifestly calculated better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union, and seeking to make an American citizen as free in one state as another, the Constitution of the United States provides, in Article IV, ß 2, that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." And the second clause of ß 1 of the Fourteenth Amendment declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

746 Purpose of Article IV, ß 2

The primary aim of Article IV, ß 2 was to help fuse into one nation a collection of independent, sovereign states, and to prevent the states from enacting measures which discriminate against nonresidents for reasons of economic protectionism. It confers on the citizens of the several states a general citizenship and all the privileges and immunities which the citizens of any state would be entitled to under like circumstances, that is, it ensures to a citizen of state A who ventures into state B the same privileges which the citizens of state B enjoy. In effect, the Privileges and Immunities Clause is an equal protection clause for nonresidents. Hence, it is intended to prevent discrimination by the several states against

citizens of other states in respect of the fundamental privileges of citizenship. It is not intended to give noncitizens of a state greater privileges than its own citizens, and it does not exempt noncitizens of a state exercising privileges therein from any liability which the exercise of such privileges would impose upon citizens of the state who exercise them. Its purpose is the outlawing of statutory classifications based upon the fact of noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of evil at which the statute is aimed. This provision, as well as the Interstate Commerce Clause, was designed to keep open commerce in goods, ideas, and individuals.

Observation: Although there is some overlap between the Privileges and Immunities Clause and the negative commerce clause, they are distinct constitutional provisions, the reaches of which are not coextensive; the commerce clause requires a nexus to commerce before it applies, whereas the Privileges and Immunities Clause has no such limitation.

747 Purpose of Fourteenth Amendment provision

The objective of the privileges and immunities provision of the Fourteenth Amendment was to preserve equality of rights and to prevent discrimination between citizens, but not radically to change the whole theory of the relations of the state and federal governments to each other and of both governments to the people. The federal constitutional provision found in Article IV, ß 2, under which the citizens of each state are entitled to all of the privileges and immunities of citizens in the several states, is to be distinguished from the national Privileges and Immunities Clause found in ß 1 of the Fourteenth Amendment, the latter having been adopted primarily to protect the newly freed slaves from oppression at the hands of state governments in the South. It was not the purpose of this clause of the Fourteenth Amendment to transfer from the states to the Federal Government the security and protection of those civil rights that inhere in state citizenship or to confer upon Congress power to legislate within the domain of state legislation. This provision seeks, as does Article IV, ß 2, to prevent an exercise of the independent power left to each state in favor of its own citizens in respect to their common personal rights as citizens and against a participation in the same rights by citizens of other states.

748 Effect of provisions; generally

The very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States. A citizen coming from another state is entitled under the Federal Constitution to the privileges and immunities of citizens of the state into which he or she has come, but has no right to claim any greater privileges. The constitutional guarantee of rights and immunities to the citizen assures to him or her the privilege of having those rights and immunities judicially declared and protected. Neither Article IV, ß 2, of the Federal Constitution nor the Privileges and Immunities Clause of the Fourteenth Amendment abridges the right of protection inherent in a state and reserved when the Federal Constitution was adopted. The privileges and immunities of federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as are necessary for the general good, and such provisions do not interfere with the police power of the state to protect the lives, liberty, and property of its citizens and to promote their health, morals, education, and good order. In matters of public policy, however, discrimination based upon citizenship is invalid. Although different states may have different policies, and the same state may have different policies at different times, any policy which the state may choose to adopt must operate in the same way on its own citizens and those of other states.

749 Article IV, ß 2

Article IV, ß 2 of the Constitution, by giving the citizens of each state the privileges and immunities of the citizens of the several states, places the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. Specifically, Article IV, ß 2: relieves citizens of one state from the disabilities of alienage in all other states; inhibits discriminating legislation against them by other states; gives them the right of free ingress into, and egress from, other states; ensures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

The Privileges and Immunities Clause has among its principal goals the promotion of national economic unity, the elimination of protectionist burdens on interstate commerce, and the prevention of discrimination by states against citizens of other states. Like many other constitutional provisions, the Privileges and Immunities Clause of Article IV, ß 2, is not an absolute. For instance, the Privileges and Immunities Clause does not mandate absolute equality in tax treatment. A disparity in tax treatment between residents and nonresidents is permissible in the many situations where there are valid, independent reasons for it. And any disparate treatment occurring through application of a state statute making the attorney of a nonresident plaintiff liable for costs does not violate the constitutional Privileges and Immunities Clause as applied to a nonresident plaintiff in a federal diversity action. The guarantee to the citizens of each state contained in this provision of the Constitution implies no concession by or in one state to the laws of any other state and does not

impart any extraterritorial vigor to the laws of any state. It does not make the privileges and immunities enjoyed by the citizens of one state under the constitution and laws of that state the measure of the privileges and immunities to be enjoyed as a matter of right by citizens of another state under its constitution and laws.

Article IV, ß 2 of the Federal Constitution bars discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, but it does not preclude disparity of treatment in the many situations where there are perfectly valid, independent reasons for it. The constitutional provision does not secure to a citizen leaving his or her home state and entering another state special privileges which the citizen enjoyed under the laws of his or her home state. The Privileges and Immunities Clause does not infuse citizens with new and independent rights; the clause merely establishes a norm of comity without specifying the particular subjects as to which the citizens of one state coming within the jurisdiction of another are guaranteed equality of treatment. The inhibition of Article IV, ß 2 applies to discriminations against noncitizens of a state; it does not apply to the forbidding of certain conduct by all persons affecting property of a citizen of a state enacting a statute. In other words, since it merely forbids discrimination between citizens and noncitizens, it does not operate to invalidate a statute which does not discriminate with regard to those who may or may not commit an act, but which forbids such conduct with regard to all alike. Moreover, because the provision guarantees only equality of privileges and immunities between citizens of different states, its protection of privileges and immunities does not extend to a citizen of the state the laws of which are complained of. It did not profess to control the power of the state governments over the rights of its own citizens. A state may not barter away the right conferred upon its citizens by the Constitution of the United States to enjoy the privileges and immunities of citizens when they go into other states. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Article IV, ß 2 is only a limitation upon the powers of the states. The Privileges and Immunities Clause does not preclude Congress from doing anything since the clause in no way limits the powers of the Federal Government. It in no wise affects the powers of Congress over territories within the jurisdiction of the Federal Government, such as Indian reservations, or over the District of Columbia. The Federal Constitution's Privileges and Immunities Clause is applicable to the Virgin Islands territory through a provision (48 USCA ß 1561) of the Revised Organic Act of 1954.

750 Fourteenth Amendment provision

The national scope of the government under the Federal Constitution was completely broadened by the privileges and immunities provision of the Fourteenth Amendment, by causing citizenship of the United States to be paramount and dominant over state citizenship instead of being subordinate and derivative to it, the amendment operating upon all the powers conferred by the Constitution. This provision deals with the rights of citizens of the United States as such, and the privileges and immunities protected thereby are those of citizens of the United States, as distinguished from the privileges and immunities of the citizens of a state. It makes the fundamental rights, privileges, and immunities which belong to a citizen of the United States independent of his or her citizenship in any state, prohibits discriminating legislation by one state against the citizens of another, and secures to all the equal protection of the laws. It places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution and leaves the privileges and immunities of citizens of a state under the protection of the state constitution. It bridges the gap left by Article IV, ß 2, so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states. Under the Fourteenth Amendment, the simple inquiry is whether the privilege claimed is one which arises by virtue of national citizenship. If the privilege is of that character, no state can abridge it. The privileges and immunities provision of the Fourteenth Amendment is the source of many civil rights. However, this clause is not to be interpreted as a source of an implied fundamental right of intrastate travel.

Observation: The enforcement provision of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment; however, that power extends only to the enforcement provisions of the Fourteenth Amendment. The scope of authority granted to Congress under the enforcement provision does not extend to decreeing the substance of the Fourteenth Amendment's restrictions on the states, as Congress does not enforce the constitutional right by changing what that right is. Congress has only been given the power to enforce, not the power to determine, what constitutes a constitutional violation.

This clause of the Fourteenth Amendment does not add to the privileges or immunities of citizenship in the United States; it merely furnishes guarantees additional to those which already existed. Hence, this clause does not have the effect of making all the provisions of the Bill of Rights operative in state courts, on the ground that the fundamental

rights protected by those amendments are, by virtue of the Fourteenth Amendment, to be regarded as privileges or immunities of citizens of the United States. Furthermore, the Privileges and Immunities Clause of the Fourteenth Amendment affords no protection to any citizen where Congress itself has imposed or authorized the infringement.

751 State citizenship and its privileges

Privileges and immunities which belong to a citizen solely by virtue of state rather than national citizenship are not broadly protected. The privileges and immunities guaranteed to a citizen by Article IV, ß 2 in a state other than that of his or her citizenship are such privileges and immunities as are enjoyed by citizens of that state, not those guaranteed by the constitution and laws of his or her own state. Hence, the privileges and immunities of an individual as a citizen of a state, outside of the state, depend upon comity. Moreover, the Privileges and Immunities Clause of the Fourteenth Amendment to the Federal Constitution does not limit the power of a state over those rights of its own citizens which exist by virtue of their state citizenship. The state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States.

Despite the foregoing, there are some matters so related to state sovereignty that, even though they are important rights of a resident of that state, discrimination against a nonresident is permitted. These privileges which states give only to their own residents are not secured to residents of other states by the Federal Constitution. Included are such matters as the elective franchise, the right to sit upon juries, and the right to hold public office. The reasons are obvious. If a state were to entrust the elective franchise to residents of another state, its sovereignty would not rest upon the will of its own citizens; and if it permitted its offices to be filled and their functions to be exercised by persons from other states, the state citizens to that extent would not enjoy the right of self-government. There are also numerous privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states to sue in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give a bond for costs, although such bond is not required of a resident. A statute restricting the right to carry a concealed weapon to state residents does not violate the Privileges and Immunities Clause of the Fourteenth Amendment; the factor of residence has a legitimate connection with the statute, since substantial danger to the public interest would be caused by an unrestricted flow of dangerous weapons into and through the state.

The Federal Constitution does not guarantee to the citizens in one state, while residents there, all the privileges that they would enjoy if they had their domicil and legal residence in another state. It has been held, however, that if a state seeks to grant special privileges to its own citizens which are of such a nature as to fall within the purview of the privileges and immunities covered by Article IV, ß 2, the constitutional provision will automatically secure to citizens of other states the special privileges so granted by the state to its own citizens. A former citizen who has renounced his citizenship is not entitled under the Privileges and Immunities Clause of the United States Constitution to enter and remain in the United States by virtue of being a citizen of the state in which he formerly resided.

752 State constitutional immunities and privileges provisions

In some jurisdictions the state constitutions specifically provide that no citizen shall be deprived of any right, privilege, or immunity. Such state constitutional requirements of equal privileges and immunities are independent of and distinguishable from those imposed by the Fourteenth Amendment to the United States Constitution, even though in many instances the state and federal provisions are interpreted identically.

Practice guide: In determining whether a statute violates the equal privileges and immunities provision of a state constitution, a court must accord considerable deference to the manner in which the legislature has balanced the competing interests involved, and the inquiry begins with a presumption of validity; therefore, the challenger labors under a heavy burden to negate every conceivable basis which might have supported the classification, which is primarily a legislative question.

753 Who is barred from infringing privileges and immunities

The United States Supreme Court has stated the inclusive principle that all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States. The Fourteenth Amendment prohibits any act by a state which abridges the privileges and immunities of citizens of the United States, whether such act is by the legislative, executive, or judicial authorities of the state. The prohibitions of the amendment extend to every department of the state and every officer or agent by whom the powers of the state are exerted. Moreover, Congress has the power, where privileges and immunities are abridged, to counteract and render nugatory all state laws and proceedings which have the effect of abridging any of the privileges or immunities of citizens of the United States. The prohibition against state actions violating the Privileges and Immunities Clause also applies to municipalities and municipal ordinances. However, the prohibitions of the Fourteenth Amendment and of Arti-

cle IV, ß 2 do not apply to any actions or conduct of private individuals, and do not authorize direct legislation by Congress to regulate the conduct of citizens among themselves, even though such individual conduct may abridge the privileges and immunities of citizens of the United States.

754 Generally

The privileges and immunities provisions of Article IV, ß 2, and of the Fourteenth Amendment, speak in terms of "citizens." Natural persons, and they alone, are entitled to the privileges and immunities which the Constitution secures for "citizens." Though children must be afforded their rights under the Privileges and Immunities Clause, the applicability of such rights to children is not without limitation.

A state is not a "person" within the meaning of the privileges and immunities guarantees, and therefore cannot assert that its own enactments deny it such rights. A partnership, the estate of a deceased individual, an unincorporated association, or a corporation is not a citizen within the meaning of either of these constitutional provisions, and none of them can assert a violation of the Privileges and Immunities Clause of the Fourteenth Amendment. And a state may not maintain a claim against another state under the Privileges and Immunities Clause, which protects people, not states.

755 Citizens of the United States and of the states

The Fourteenth Amendment contemplates, secures, and protects two sources of citizenship, and two sources only: birth and naturalization; and it has been held that the Privileges and Immunities Clause of the Fourteenth Amendment applies only to persons born or naturalized in the United States. In the Constitution of the United States the word "citizen" is generally, if not always, used in a political sense to designate one who has the rights and privileges of a citizen of a state or of the United States. It is so used in the first section of the Fourteenth Amendment. Under this amendment, it is clear that the inhabitants of a state have a dual citizenship: one a general or national citizenship, which is independent of, and separate from, their citizenship of a particular state; and the other a citizenship of the state in which they reside.

756 Nonwhites, Indians, aliens

While the main purpose of the Fourteenth Amendment was to establish and foster the citizenship of the black population of the United States, the operation of that constitutional provision protecting privileges and immunities is by no means confined to any particular race of people. A state must give to any citizen of the United States, regardless of his or her race or national origin, who becomes a bona fide resident therein, the same rights, privileges, and immunities secured by its constitution and laws to its other citizens. Congress has the power to confer upon Indians the privileges of citizenship, and has done so with respect to Indians born within the territorial limits of the United States. Indians are not excepted from the protection guaranteed by the Constitution, and their private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. An alien is not a citizen of the United States and is not generally entitled to the privileges and immunities of citizenship. And the fact that citizen children of Western Hemisphere alien parents may at one time have had a statutory privilege whereby they could obtain priority status for their parents to become permanent legal residents did not vest in them a constitutional right embodying the terms of such statutory grant so as to thereby render unconstitutional a repeal of the privilege whereby their parents could obtain priority status on consular waiting lists.

757 Municipal corporations; state agencies

A municipal corporation created by a state for the better ordering of government has no privileges or immunities under the Federal Constitution which it may invoke. A county agency cannot assert a violation of privileges and immunities against the state which created it. The same principle applies to a board or agency created by the state to enable it to perform certain governmental duties. And a public telephone company does not have any privileges or immunities under the Fourteenth Amendment where the company is a subdivision of the state.

The Privileges and Immunities Clause of the United States Constitution has no application to a claim involving relations between two subordinate governmental units of the same state.

758 Residents and nonresidents of a state, generally

Discrimination under the Privileges and Immunities Clause of the United States Constitution exists when residents and nonresidents of a state are treated in different ways, not when they are treated in the same way. Less favorable treatment by a state towards nonresidents runs afoul of the Privileges and Immunities Clause if the activity in question is sufficiently basic to the livelihood of the nation as to fall within the purview of the clauses, and if it is not closely related to the advancement of a substantial state interest. A state's exclusion or discrimination against nonresidents need not be absolute to be actionable under the Privileges and Immunities Clause. A citizen of a state may acquire and claim rights under the laws of another state without actually going into it. He or she may enter into contracts to be executed in another state and may acquire and own property, personal and real, situated therein, by purchase, bequest, or inheritance. And the rule is firmly settled that not only by virtue of Article IV, ß 2, but also because of the Privileges and Immunities

Clause of the Fourteenth Amendment, the right of a citizen of one state to pass into any other state of the Union or to reside therein for the purpose of engaging in lawful commerce, trade, or business without molestation is secured and protected. As long as the person remains a citizen of a particular state, however, he or she may within certain limits owe allegiance to its sovereignty. Citizenship and residence in a state are not necessarily synonymous.

Observation: Although the Fourteenth Amendment specifically says that United States citizens are citizens of the state in which they reside, there may be a temporary residence in one state, with intent to return to another, which will not create citizenship in the former.

Merely because a statute is couched in terms of residence, it is not ipso facto outside the scope of the Privileges and Immunities Clause, which speaks of citizens; while the clause speaks to citizens of other states, from a practical point of view, it bars discrimination against nonresidents, and only against nonresidents of the state. If a state statute or regulation imposes identical requirements on residents and nonresidents alike and has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause of Article IV.

Observation: Residents of a state are generally citizens of that state, and citizens of a state are usually residents of that state; and, as has been previously noted, under the Privileges and Immunities Clause of Article IV, the terms "citizen" and "resident" are normally used interchangeably. Unless the distinction is made clear by enactment or by judicial interpretation, as a usual rule residents include only citizens, and nonresidents are noncitizens. Hence, any law of a state which broadly discriminates against all nonresidents without being construed to include nonresident citizens of such state and which generally seeks to create an alienage which, although based upon residence in form, is based upon citizenship in meaning and effect, discriminates against United States citizens who are not citizens of the state and unconstitutionally violates their privileges and immunities.

The United States Supreme Court and other courts have stated quite broadly that a statute conferring privileges may validly discriminate between residents and nonresidents where the distinction is based on rational considerations, but not otherwise. Thus, when a challenged restriction deprives nonresidents of a privilege or immunity protected by the Privileges and Immunities Clause, it is invalid unless there is a substantial reason for the difference in treatment, and unless the discrimination practiced against the nonresidents bears a substantial relationship to a legitimate state objective. The Court has also held that a law is not immune from review under the Privileges and Immunities Clause at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged. In other words, the Privileges and Immunities Clause of Article IV, ß 2 bars discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, the inquiry in each case being whether such reasons do exist and whether the degree of discrimination bears a close relation to them. Such a determination should be made with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Practice guide: In determining whether a residency-based restriction of an activity offends the privileges and immunities protections, a court must undertake a two-step inquiry: (1) the activity in question must be sufficiently basic to the livelihood of the nation as to fall within the purview of the Privileges and Immunities Clause; and (2) if the challenged restriction deprives nonresidents of a protected privilege, the restriction is invalidated only if it is not closely related to the advancement of a substantial state interest.

759 Generally; history and definition

The first occurrence of the words "privileges and immunities" in American constitutional history is to be found in the fourth of the Articles of the old Confederation. That document declared: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties, or restriction shall be laid by any State, on the property of the United States, or either of them." In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in Article IV, ß 2 in the following words: "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." There can be but little question that the purpose of both these provisions is the same and that the privileges and immunities intended are the same in each.

The Constitution, however, does not define the term "privileges and immunities." Thus, the threshold inquiry in a case involving the Privileges and Immunities Clause is whether the interest subject to state legislation is a privilege or immunity within the meaning of the clause. The Supreme Court of the United States has never undertaken to give any exact or comprehensive definition of these words as used in the Constitution, but has adopted the plan of leaving their meaning to be determined in each case upon a view of the particular rights asserted and denied therein. It has been decided, however, that the words "immunity" and "privilege" are synonymous, or nearly so. "Privilege" signifies a peculiar advantage, exemption, or immunity; and "immunity" signifies an exemption or a privilege. The privileges and immunities secured to citizens of each state by Article IV, ß 2 of the Constitution are those privileges and immunities which are common to the citizens in those states under their constitutions and laws by virtue of their being citizens, and that are fundamental in nature.

The Privileges and Immunities Clause of the Fourteenth Amendment protects only certain rights of national citizenship, namely, those which arise out of the nature and essential character of the national government and which are granted or secured by the Constitution, or by the laws and treaties made in pursuance thereof, and not those that spring from other sources. These privileges and immunities, arising out of United States citizenship, are the ones which are protected by the Fourteenth Amendment.

760 Generally; "fundamental" privileges and immunities

The courts, in determining what are the privileges and immunities of citizens of the several states, have repeatedly stated that these are those privileges and immunities which are fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." The Privileges and Immunities Clause of the Federal Constitution prohibits only significant discrimination by a state against nonresidents. The United States Supreme Court has pointed out, furthermore, that the words "privileges and immunities," as used in Article IV, ß 2 of the Constitution, are words of very comprehensive meaning. However, it is important to bear in mind that a fundamental right inherent in state citizenship is a privilege or immunity of state citizenship alone.

Notwithstanding that privileges and immunities which are constitutionally protected are characterized by their fundamental nature, there is a distinction between such privileges and immunities and those rights commonly described as fundamental rights of persons. The inherent and inalienable rights which are common to all persons who are members of a civilized society from the complexity of human relationships include a great variety of social prerogatives. All persons have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness. These fundamental rights appear to be distinct from the privileges and immunities of citizens as such, possess characteristics peculiar to themselves, and have received separate consideration herein. Artificial or remedial rights are contradistinguished from these and include such rights as that of citizenship itself, the right to vote, and the right to the particular methods of procedure pointed out in the Constitution which are peculiar to our jurisprudence.

761 Acquisition and possession of property

Under Article IV, ß 2 of the Federal Constitution and under the Privileges and Immunities Clause of the Fourteenth Amendment, a citizen is entitled to acquire and hold both real estate and personal property and to protect and defend the same in law. The privileges and immunities of citizenship relating to the acquisition and possession of property are subject, however, to such restraints as a state may justifiably prescribe for the general welfare.

762 Contract matters; generally

The right of a citizen of the United States resident in one state to contract in another may be a liberty safeguarded by the Due Process of Law Clause and at the same time a privilege protected by the Privileges and Immunities Clause of the Fourteenth Amendment. However, according to the express words and clear meaning of Article IV, ß 2, no privileges are secured except those which belong to citizenship. Rights attached by the law of contracts, by reason of the law of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to such contracts, cannot be deemed privileges within the meaning of the Constitution. Moreover, marital rights attached to the contract of marriage are not included within the privileges.

Under the Privileges and Immunities Clause, one factor in evaluating whether a state's discriminatory action can be constitutionally justified is the state's "proprietary interest" in the activity; a "proprietary interest" can arise from ownership of a natural resource or expenditure of state funds, such as funding a public works project. However, the fact that legislation involves a state in its proprietary capacity does not justify discrimination against nonresidents which is prohibited by the Privileges and Immunities Clause.

763 Public contracts

In the case of public contracts, it has been held proper, in some instances, to require that the work be done or the materials be produced in the state or, in other instances, that a preference be given to residents of the state in order to relieve local unemployment or encourage local industry, but the Supreme Court has held that an out-of-state resident's interest in employment by private employers on public works projects in another state is sufficiently fundamental to the promotion of interstate harmony and sufficiently basic to the livelihood of the nation as to fall within the purview of the Privileges and Immunities Clause. A statute which provides that a nonresident contractor who fails to register with the state shall not be entitled "to maintain an action to recover payment for performance on the contract in the courts of this State" is not violative of the privileges and immunities provision of United States Constitution where the statute applies only to contracts in excess of $ 10,000 which were to be performed within the state, where the registration fee is only $ 10, and where the principal purpose of the statute is to require that a bond be posted to ensure payment of unemployment contributions which are the responsibility of the contractor, and where the statute is not designed to discriminate against nonresident contractors, but is to bring them into parity with resident contractors.

764 Pursuit of occupations; generally

The right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States, and the pursuit of an occupation outside one's home state is a right protected by the Privileges and Immunities Clause. For instance, the ability of a citizen of one state to act as an insurance consultant in another state must be considered a fundamental right or privilege protected by the Privileges and Immunities Clause which cannot be conditioned by a residency requirement. The Federal Constitution guarantees to citizens of state A the privilege of doing business in state B on terms of substantial equality with the citizens of state B. Hence, a state may not, consistent with the Federal Constitution, prohibit the citizens of other states from carrying on legitimate businesses within its borders under the same conditions as it permits its own citizens to do so, although municipal firefighters challenging a state requirement of in-state residency have no fundamental right within the meaning of the Privileges and Immunities Clause to be employed as municipal firefighters. Even a small fee can offend the Privileges and Immunities Clause if the facts indicate that the fee is imposed for no other purpose than to impose a heavier burden on nonresidents. But a statute imposing a $ 5 decal fee only on out-of-state truckers to defray the costs of requiring such truckers to register with the state and to indicate that they had registered by prominently displaying the decal on their trucks does not violate the out-of-state truckers' rights under the Privileges and Immunities Clause. Similarly, a state's inspection laws may not discriminate against the products and industries of another state, in favor of its own products and industries. On the other hand, the privilege and immunity of engaging in ordinary callings is not absolute. It includes only the right to pursue any lawful calling without let or hindrance, except under such reasonable regulations as may be applied to all persons of the same condition. A state may impose reasonable conditions upon the citizens of a foreign state who seek to do business within its borders, especially when like conditions are imposed upon its own citizens. And a state, in the valid exercise of its police power, may limit the right of individuals to engage in certain professions or callings, though the effect is to place noncitizens at a disadvantage, if the regulation is inherently reasonable.

765 Practice of law

The Privileges and Immunities Clause protects the right of citizens to engage in legitimate professional activities throughout the United States without geographic restrictions. The practice of law is a privilege protected by the Privileges and Immunities Clause, and a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the clause. Therefore, a rule requiring members of a state bar to reside within the state is unconstitutional. Thus, a rule requiring that applicants for admission to practice in a particular place must reside therein for one year prior to applying for admission to practice is invalid.

Observation: Reasons, such as suppositions that nonresidents would be less likely to become and remain familiar with local rules and procedures, to behave ethically, to be available for court proceedings, and to do pro bono and other volunteer work, do not meet the test of substantiality required by the Privileges and Immunities Clause to justify discrimination against nonresidents with regard to admission to a state bar.

A rule admitting only those out-of-state attorneys to the bar without examination who intend to practice full time in the state is not invalid under the Privileges and Immunities Clause with respect to an attorney residing in the state who intended to practice part-time therein. As an occupation important to the national economy, the practice of law is a "privi-

lege" under the Privileges and Immunities Clause, and, as such, it may be surrounded with whatever reasonable restrictions the legislature may prescribe. A state may, for instance, require that all attorneys admitted to practice therein must maintain an office within the state, even if they reside outside the state. Although it is true that the practice of law is a lawful occupation in itself, it is also well established that it is not a natural right or a right guaranteed by the Constitution. Unjustified state discrimination against nonresidents with respect to the practice of law impermissibly burdens individuals engaged in commerce and frustrates the goal of the Privileges and Immunities Clause to create a national economic union. However, admission to professions, such as the legal profession, may be regulated within reason without violation of the Privileges and Immunities Clause of the Federal Constitution. Thus, a requirement that applicants for admission to the state bar must have graduated from a law school accredited by the American Bar Association does not discriminate between residents and nonresidents, and therefore does not violate the Privileges and Immunities Clause. And a court rule allowing admission to the bar without examination if the applicant has been awarded a J.D. degree or its equivalent by a law school which, at the time of the awarding of the degree, was approved by the American Bar Association, does not violate the Privileges and Immunities Clause.

The requirement of taking and passing a bar exam, in light of its universality, has a close or substantial relationship to a state's legitimate objective of keeping up the quality of its bar and, while alternative methods of keeping up that quality can easily be imagined, the bar examination requirement does not violate the Privileges and Immunities Clause. A requirement that a nonresident attorney pass the state bar exam before admission to the state bar, while new residents who have practiced law continuously for five of the last seven years in the state in which they were licensed can gain admission on motion alone, does not offend the Privileges and Immunities Clause, where most residents of the state are still required to take the bar exam, and the distinction between residents and nonresidents is reasonable, inasmuch as an attorney seeking admission to the bar as a nonresident is likely to be contemplating at least a two-state practice, while an attorney who becomes a new resident is likely abandoning his or her old practice and establishing a new one in the state.

Observation: Entitlement to an award of attorney's fees is not sufficiently basic to the national economy as to be a privilege protected by the Privileges and Immunities Clause. Under the Privileges and Immunities Clause, no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state.

766 Practice of medicine or dentistry

As is the case with the practice of law, the privileges and immunities of national citizenship do not include the absolute right to practice medicine or dentistry anywhere one pleases, and a mandatory assessment imposed on all licensed physicians to provide funding for a state's birth-related neurological injury compensation plan does not violate the Privileges and Immunities Clause of the Fourteenth Amendment, where the assessment has no relationship to the residence of any licensed physician, but rather is imposed on the privilege of holding a physician's license. And a state optometry board's refusal to grant an applicant an optometrist's license did not violate the Privileges and Immunities Clause, where the board did not seek to deny the applicant a license because of his residency or nonresidency, but rather because the educational requirements and standards under which he obtained a license in his former state of residence did not equal the standards for licensing in his new state of residence.

767 Issuance of licenses and permits

A state may not refuse to issue most kinds of licenses to nonresidents, nor may it ordinarily require nonresidents to become residents in order to obtain such licenses. Thus, license legislations that discriminate against nonresidents of the state (or nonresidents of a political subdivision of the state), either by refusing to grant licenses to such nonresidents or by granting them on different terms, where not required under the police power of the state for the protection of the local citizens, are, as a general rule, void as violating Article IV, ß 2 of the Federal Constitution. For example, a statute's denial of a real estate broker's license to out-of-state brokers whose resident states do not have a reciprocal agreement with the denying state is facially unconstitutional under the Privileges and Immunities Clause, since a less restrictive means could be imposed to achieve the objective of restricting licensure to persons knowledgeable in that state's property laws and procedures, such as requiring mandatory attendance at seminars or increased reporting requirements. But Alabama statutes requiring that an applicant for an Alabama real estate broker's license maintain a "place of business" in Alabama does not violate the Privileges and Immunities Clause since the statutes apply to residents and nonresidents alike.

768 Rights concerning labor and employment

Employment, at least as an abstract concept, is a fundamental right entitled to the protection of the Privileges and Immunities Clause. However, direct public employment is not a privilege or fundamental right protected by the Privileges and Immunities Clause. A state law limiting the number of working hours each day in a particular industry does not abridge the privileges or immunities of citizens of the United States. But a city ordinance which required businesses

which received economic incentives from the city to make a good faith effort to hire 51 percent city residents as employees burdened the opportunity of out-of-state residents to seek employment with such businesses, which is a privilege protected by the Privileges and Immunities Clause. An ordinance requiring the fingerprinting of persons seeking employment in establishments selling alcoholic beverages at retail for consumption on the premises and the sending of such fingerprints to the state and federal bureaus of identification, and providing that such information received should be confidential, does not violate the Privileges and Immunities Clause of the Federal Constitution. The failure of school board members to grant periodic salary increases to a teacher has been held not to constitute a deprivation of a privilege or immunity secured by the Constitution. There is some conflict of judicial opinion as to whether, or to what extent, a state may discriminate in favor of its own residents or citizens in respect to the benefits provided under a workers' compensation act, in light of the Privileges and Immunities Clause. An unemployment compensation statutory provision requiring an unemployed individual to be available for work, in order to be eligible for benefits, has been held not to violate the Privileges and Immunities Clause.

769 Access to courts

Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind. While a state may decide whether and to what extent its courts will entertain particular causes, any policy the state may choose to adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the latter class it must afford to the same extent to the other, [n61] but not to any greater extent.

Equality of treatment in this respect is not left to depend upon the comity between the states, but is guaranteed by the Federal Constitution. If the state provides a court to which its own citizens may resort in a certain class of cases, citizens of other states of the Union also will have a right to resort to it in cases of the same class. However, a distinction not based on the citizenship of prospective litigants does not violate Article IV, ß 2 of the Federal Constitution. Moreover, a reasonable discrimination by the courts of a state against nonresidents does not violate the Privileges and Immunities Clause, as in the case of state statutes which debar a nonresident individual defendant from appearing and defending unless he or she first gives special security.

By reason of the Privileges and Immunities Clause of Article IV of the Federal Constitution, under which the citizens of each state are entitled to the privileges and immunities of citizens in the several states, a state cannot allow suits by nonresident citizens of the state for liability under the Federal Employers' Liability Act arising out of conduct outside that state, and discriminatorily deny access to its courts to a nonresident who is a citizen of another state; but if a state chooses to prefer residents in access to its courts and to deny such access to all nonresidents, whether its own citizens or those of other states, it is a choice within its own control, and this is true also of actions for personal injuries under the Federal Employers' Liability Act. Insofar as such is not prohibited by the Privileges and Immunities Clause, the fact that the parties to an action are noncitizens or nonresidents of the state may be taken into consideration by a court in determining whether to apply the doctrine of forum non conveniens, and the application of such doctrine so as to refuse to exercise jurisdiction in an action brought by a citizen of an American sister state is not repugnant to the Privileges and Immunities Clause if, under the particular circumstances, the exercise of jurisdiction would have been refused had the plaintiff been a citizen of the forum state, so that, for example, although courts of a particular state may, because of the crowded calendars, refuse, under the doctrine of forum non conveniens, to exercise jurisdiction in actions brought by nonresidents, they must apply this to citizens and noncitizens of the state indiscriminately. Questions as to privileges and immunities are often raised by attempts to prevent access by noncitizens of a state to the federal courts. The rule is that wherever a citizen of a state can go into the courts of a state to defend his or her property against the illegal acts of its officers, a citizen of another state may also invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot limit a citizen of another state who has property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts.

The converse is also generally true. A state may not under the Federal Constitution deny access to its courts of general jurisdiction to a resident of another state to recover under a federal statute solely because the suit is brought under a federal law. And the privileges and immunities of national citizenship do not encompass the right to have a federal question heard in a federal forum.

770 Rights respecting civil remedies and procedure

Notwithstanding that the right of access to courts which falls within the protective scope of the privileges and immunities guarantee includes the right to employ the usual remedies for the enforcement of personal rights, it is the rule that if

the requirements of the Due Process Clause as to notice and hearing are satisfied, the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations may be enforced. Hence, it is not a privilege or immunity of a citizen of the United States to have a controversy in a state court prosecuted or determined by one form of action instead of by another.

Discrimination under a state's nonresident attachment statute, which authorizes an attachment for security purposes against state residents only upon a showing that a defendant is attempting fraudulently to conceal or dispose of his or her assets, but requiring no such showing by a plaintiff seeking attachment against a defendant who is a nondomiciliary residing outside the state, has a rational basis, and therefore such a statute is not unconstitutional under the Privileges and Immunities Clause. And a trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge. In any event, a plaintiff's complaint involving an alleged lack of procedural protections does not violate any rights under the Privileges and Immunities Clause of the Fourteenth Amendment, where he or she does not assert any challenge to any state law or enforcement thereof which has allegedly abridged his or her privileges and immunities.

Statutes relating to the service of process have been attacked on the ground of violation of the Privileges and Immunities Clauses. Such challenges, however, have met with little success. Distinction between residents and nonresidents as to the creation of a defense by operation of a statute of limitations has been sustained by the courts. A person cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to the courts to enforce his or her rights, where he or she is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent person to institute proceedings for their protection. A state statute, providing that suicide should not be a defense to an action on an insurance policy issued to a citizen of that state except under certain circumstances, does not deny to citizens of states other than that state any privilege or immunity whatsoever, but it merely restricts the freedom of its own citizens to contract in that state with respect to life insurance. And a state's "borrowing statute" providing that a court of that state look to the laws of a foreign jurisdiction in a products liability action arising in that foreign jurisdiction does not infringe upon the privileges and immunities of citizens of foreign states. The Article IV Privileges and Immunities Clause is inapplicable to a local rule of a Federal District Court, since procedural rules in federal courts are matters of federal law legitimately administered by federal entities.

771 Rights involving criminal laws or procedure; generally

The privileges and immunities of a citizen of the United States do not include the right to be exempt from prosecution for an infamous crime unless upon indictment presentment by a grand jury, or from the obligation to give testimony in a criminal proceeding. A prosecutor's decision to charge one person, but not the others, guilty of the same crime does not violate the Privileges and Immunities Clause, so long as the selection was not deliberately based upon some unjustifiable standard such as race, religion, or some other arbitrary classification. And a state law prohibiting the carrying of dangerous weapons and authorizing arrest without warrant of persons carrying such weapons on their persons does not abridge the privileges or immunities of citizens of the United States.

Application of a tolling rule to a criminal statute of limitations for the period in which a defendant resides outside of the state does not violate the Privileges and Immunities Clause. And the fact that not all states have chosen to impose the death penalty does not result in a violation of the Privileges and Immunities Clause due to the absence of one consistent national rule regarding the death penalty, as the death-penalty decision is for each state's legislature to make. A state must afford to a nonresident criminal defendant the same opportunity to enter a county pretrial intervention program (which is a diversion mechanism designed to process a defendant in a manner that will effectively deter criminal or penal behavior by taking a defendant outside the traditional processes and leaving him or her without any criminal conviction) when similarly situated to a resident defendant eligible for the program. The imposition of the death penalty by electrocution as a punishment for murder does not violate the privileges and immunities of a citizen; and the keeping of such a prisoner in solitary confinement until the execution of such a sentence does not violate the Constitution. Habitual criminal or recidivist statutes do not violate the privileges and immunities of United States citizens. And the Privileges and Immunities Clause is not violated by a requirement that applicants for compensation under a state's Victims of Crime Act be residents of that state. Protection provided by a criminal statute of limitations, not found in the United States Constitution, and under the control of the state legislature, is not a "fundamental right" within the meaning of the Privileges and Immunities Clause; the tolling provision is substantially related to the state objectives of identification of criminals, detection of crimes, and apprehension of criminals.

772 Rights involving marriage, divorce, etc

Marital rights attached to the contract of marriage are not included within the privileges and immunities of a citizen, protected by the Constitution, nor does the constitutional provision include the right to secure a divorce in a state without complying with its residence requirements.

The Uniform Reciprocal Enforcement of Support Act and uniform support of dependents statutes have been held not to violate the privileges and immunities guarantees. The Privileges and Immunities Clause was not implicated by a suit brought by a natural father of a child against the child's mother, the mother's attorney, and the child's therapist, regarding a custody dispute, inasmuch as the constitutional provision was directed only against state action discriminating against the citizens of other states. The doctrine of interspousal immunity is not unconstitutional and does not violate the Privileges and Immunities Clause. The Supreme Court has ruled that a state statute denying abortions in the state to non-residents is violative of the Privileges and Immunities Clause of Article IV.

773 Rights involving educational matters

The privilege accorded to the youth of a state, of attending the public schools maintained at the expense of the state, is not a privilege or immunity appertaining to a citizen of the United States as such. It necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of his or her mere status as a "national citizen." Charging nonresidents higher tuition fees for attending a publicly supported school or university does not violate the privileges and immunities of such nonresidents. Furthermore, the privileges and immunities of school students are not denied by a school regulation authorizing corporal punishment. The ability to participate in a state-administered program providing financial assistance toward the pursuit of a professional education does not involve or concern a "fundamental" right, and thus a five-year residency requirement of the program under state law does not violate the Privileges and Immunities Clause; and the right to participate in interscholastic sports is not a fundamental privilege within the meaning of the Privileges and Immunities Clause.

774 Rights involving political matters

The privileges and immunities which are protected by the constitutional inhibition concern the personal and private rights of citizens. They do not, however, include within their meaning the right to hold public office or to become a candidate for state office, or the right to vote. A statute which prohibits a candidate from serving as his or her own campaign treasurer does not violate the Privileges and Immunities Clause of the United States Constitution since the privilege to run for office is conferred by individual states and may be conditioned by the states.

775 Rights involving recreational matters

Mere recreational rights are not protected by the Privileges and Immunities Clause. Sport fishing is not a fundamental right recognized and protected by the Privileges and Immunities Clause, and a state regulation limiting the season for certain species of fish, which has the effect of allocating fish in the state's waters to its own citizens, is not a violation of the Privileges and Immunities Clause. And a statute treating residents and nonresidents differently with regard to the requirement of having a guide for hunting big game in a wilderness area does not violate the Privileges and Immunities Clause, since recreational hunting is not a fundamental right and therefore is not a privilege or immunity of citizenship.

776 Other included or excluded matters

It is established that under the Fourteenth Amendment's privileges and immunities guarantee a citizen has the right: to come to the seat of government to assert any claim which he or she may have upon that government; to transact any business which he or she may have with it; to seek its protection; to share its offices; or to engage in administering its functions. A citizen has a right to free access to its seaports through which all the operations of foreign trade and commerce are conducted, to the subtreasury, to the land offices, and to the revenue offices. A citizen also has a right to use the streets and public places on the same basis as all other citizens. Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government on the high seas or within the jurisdiction of a foreign government. The right to assemble peaceably and petition for redress of grievances and the privilege of the writ of habeas corpus are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not upon state citizenship. Another of these privileges is conferred by the first clause of the Fourteenth Amendment: a citizen of the United States can, of his or her own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To all these may also be added the rights secured by the Thirteenth and Fifteenth Amendments and by the other clauses of the Fourteenth.

The right of a state's citizens to be admitted to or cared for by an institution maintained or supported by the state is a matter of state law, and abridgment of such right is not an abridgment of the privileges or immunities of United States citizenship. A statutory prohibition on the deposit of out-of-state solid waste in a central landfill subsidized and operated

by the state does not deprive out-of-state haulers of the privileges enjoyed by in-state haulers to deposit state-generated refuse within the landfill, and thus does not violate the Privileges and Immunities Clause of the United States Constitution. A state constitutional provision requiring each low-income housing project to be approved by a majority vote in a local referendum does not violate the Privileges and Immunities Clause of the Federal Constitution. And a pretermitted heir statute is rationally related to legitimate state purposes, including the avoidance of an unintentional omission of heirs, and does not violate the Privileges and Immunities Clause, notwithstanding the executor's contention that the statute placed pretermitted heirs in a position superior to will beneficiaries, and thus granted a privilege that other citizens did not enjoy. The privileges and immunities of a citizen do not include the right voluntarily to associate together as a military company or organization or to drill or parade with arms, without or independent of an act of Congress or law of a state authorizing the same. The applicability of the Privileges and Immunities Clause to taxation is treated in more detail elsewhere. Eligibility for personal injury protection benefits under a Compulsory No-Fault Motor Vehicle Insurance Act is not a fundamental right subject to the protection of the Privileges and Immunities Clause. A municipal ordinance establishing a preferential parking zone for residents in designated sections of the city, which differentiates between residents and nonresidents on a reasonable and rational basis and does not involve a fundamental right, does not violate the Privileges and Immunities Clause. A contractor's privilege of paying his or her employees whatever wages he or she can negotiate is not one of the fundamental rights of national citizenship guaranteed by the Privileges and Immunities Clause. Municipal firefighters challenging a state requirement of in-state residency have no fundamental right within the meaning of the Privileges and Immunities Clause to be employed as municipal firefighters. But commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are a prima facie violation of it.

24 Am Jur 2d District of Columbia Summary

District of Columbia Summary

Scope:
This article discusses the government of the District of Columbia, its basis, nature, and attributes; the general method of organization and operation of the District, including the executive, legislative, and judicial branches of government, and liability of the District of Columbia in tort.

Federal Aspects:
This article discusses the federal constitutional provision (US Const, Art. I ß 1, cl. 17) under which the District of Columbia was created and from which Congress derives its authority over the District. Also discussed are miscellaneous federal statutes relating to the creation of, authority of Congress over, and the administration and liability of the District of Columbia. Additionally, the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (P.L. 104-8), an uncodified federal statute providing for various aspects of budgeting and financial affairs of the District is discussed.

1 Generally; constitutional basis of government

The District of Columbia exists by virtue of a provision of the Constitution of the United States, providing that the Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States. The word "exclusive," was used to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states and not to suggest that the power to exercise such exclusive legislation is nondelegable.

Observation: It has been said that the necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the Constitution.

2 Territorial boundaries

In furtherance of the constitutional design, Maryland and Virginia each ceded a block of their respective territories lying on the Potomac River to the Congress and government of the United States, which were accepted by Congress, the boundaries of the District being established by presidential proclamation of March 30, 1791. Subsequently, that portion of the District which had been acquired from Virginia was returned to that state by an act of retrocession of Congress.

A 1945 Act relating to the boundary line between the District of Columbia and the Commonwealth of Virginia established a "new" boundary line with all the land on the Virginia side of the Potomac River, lying between boundaries set forth in the Act and mean high water mark as it existed on January 24, 1791 being located within the Commonwealth of Virginia, regardless of which state, Maryland or Virginia, the land was located in prior to 1791. This change had no

effect on the title to land lying between the 1945 boundary line and the 1791 boundary line; thus, land lying east of the 1791 line and titled in United States and arguably in the District of Columbia was still titled in the United States, notwithstanding that it may have been west of the 1945 line and was clearly not within the Commonwealth of Virginia.

The District of Columbia is that portion of the territory of the United States ceded by the state of Maryland for the permanent seat of government of the United States, including the Potomac River in its course through the District, and the islands therein. All of the territory constituting the permanent seat of the government of the United States will continue to be designated as the District of Columbia.

3 Applicability of federal and state laws to District

The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, are to remain in force except insofar as they may be inconsistent with or are replaced by some provision of the District of Columbia Code of 1901.

The District of Columbia is considered as a state for purposes of actions under specific federal statutes relating to civil rights, and any act of Congress that is applicable exclusively to the District is considered to be a statute of the District. A claim under District of Columbia law does not "arise under federal law" and provide federal court jurisdiction simply because District law incorporates federal law.

Congress has adopted the Uniform Commercial Code for the District of Columbia.

4 Generally

The Federal Constitution invests Congress with authority to exercise exclusive legislation in all cases whatsoever over such district as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States. Under the constitutional provision, Congress is given full or plenary power to legislate for the District of Columbia. The scope of congressional power over the District of Columbia is expansive. If Congress chose, it could govern the District of Columbia directly, without the help of the municipal government or its agencies. The Constitutional guarantee of a republican form of government in every state applies to states and does not restrict the power of Congress to legislate for the District of Columbia. By force of the constitutional grant, Congress possesses the combined powers of a general and a state government in all cases where legislation for the District is possible.

Illustration: Congress was authorized by the United States Constitution to enact a section of the Washington Metropolitan Area Transit Authority (WMATA) compact that limits jurisdiction over actions against the WMATA to federal courts and courts of Maryland and Virginia.

Congress' plenary power over the District of Columbia means no more than that Congress is akin to a state legislature, and not that the government thereof is not legislative in character. The power of Congress over the District relates to all the powers of legislation which may be exercised by a state in dealing with its affairs. When it legislates for the District of Columbia, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. When Congress passes legislation for the District of Columbia under the power expressly delegated to it by the Constitution to exercise exclusive legislation in all cases over the District, it acts in like manner as the legislature of a state and may choose to exercise only part of its powers and limit itself to those powers which would be available to a state legislature or it may exercise within the District the general legislative powers delegated to it by the Constitution.

Congress may adopt one rule of substantive criminal law for the District while promulgating a different one for the general federal system.

Congress also has the power to levy and collect taxes in the District of Columbia.

5 Police power

Since the legislative powers of Congress over the District of Columbia are unlimited, the power of Congress to enact regulations affecting the public peace, morals, safety, health, or comfort within the District of Columbia is the same as that a state legislature or a municipal government would have in legislating for state or local purposes. The police power of Congress in the District of Columbia is substantially the same under the Fifth Amendment as that which may be exercised by the states under the limitations of the Fourteenth Amendment. Although the police power fundamentally be-

longs to the states and not to the federal government, the right to exercise it for the general good is an inherent attribute of sovereignty, with the result that Congress could exercise the police power with respect to matters local to the District of Columbia. Accordingly, Congress' exercise of the police power in legislating for the District has been upheld by the courts in various specific instances, including the enactment of legislation to police drug activity in the District of Columbia, the enactment of the District of Columbia Redevelopment Act of 1945, the regulation of life insurance contracts, and the enactment of legislation prohibiting and penalizing combinations for the purpose of fixing prices for services.

6 Delegation of powers

The exclusive legislative power of Congress with respect to the District of Columbia may be delegated to the District itself, subject to the constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted. Congress may also delegate all or part of its plenary legislative power over the District of Columbia to other bodies, and may make such allocations of power among those bodies as it deems appropriate. The District of Columbia Court Reform Act and Home Rule Act did not repeal by implication former statutes delegating power to federal agencies where the congressional delegation of power was of long standing and consistent with the express provisions of both Acts.

Illustration: Congress, by enactment of a statute creating the District of Columbia Financial Responsibility and Management Assistance Authority and amendments thereto, delegated its plenary power to run the schools of the District of Columbia to the Authority.

The District of Columbia Self-Government Act does not bind Congress to the Contract Clause for congressional legislation for the District of Columbia despite delegation of legislative authority to local officials. The Act expressly recognizes congressional authority to exempt congressional legislation for the District of Columbia from any contract clause limitation.

7 Pre-emption

Neither the District of Columbia Council nor its electors can overrule acts of Congress. The District is not authorized to repeal legislation national in scope, notwithstanding that the repeal would affect enforcement of legislation only within the District's jurisdiction.

Illustration: A District of Columbia Mental Health Information Act dealing with mental health records was pre-empted by a federal veteran's record statute comprehensively regulating the disclosure of veteran's records, as was a District of Columbia law controlling the release to insurance carriers of sensitive patient information which would require carriers to disobey federal regulations. Similarly, a District of Columbia scheme of regulation establishing level of care distinctions in the licensing and regulation of nursing facilities was pre-empted by a federal scheme establishing a single standard of care. A federal act pre-empted a District of Columbia Act providing alternatives to traditional punishment of addicts where the federal and District statutes defined the class of eligible addicts differently. A District of Columbia Code provision stating that a borrower making more than a 20 percent down payment cannot be required to make escrow payments of real estate taxes or casualty insurance was pre-empted by a directly contrary federal statute dealing with federal savings and loan associations. The pre-emption provision of Petroleum Marketing Practices Act pre-empted only those provisions of the District of Columbia Retail Service Station Act which addressed termination, nonrenewal, or notice required with respect to those practices.

8 Generally; as municipal corporation

The District of Columbia is a distinctive and unique governmental unit. It has been declared by Congress to be a body corporate with all the powers of a municipal corporation, yet the District is not strictly a local municipal authority because of its peculiar status as the seat of the national government.

Illustration: Although the District Court for the District of Columbia has held that the United States park police has concurrent jurisdiction with the metropolitan police department within the District of Columbia, and thus the park police is authorized to operate in the District of Columbia outside of the parks themselves, the District of Columbia Court of Appeals has disagreed and held that Park Police lack statutory authority to be issued search warrants.

The United States, as a sovereign power, is entirely separate and distinct from the District of Columbia as a municipal corporation. The District of Columbia is not an agency or instrumentality of the United States, and the United States Government is not liable for the obligations of the District of Columbia as a municipal corporation unless Congress has otherwise provided. The District of Columbia, in turn, is a municipal corporation, and not a department of the federal government, as such, the District may not, for example, rely on federal limitation of action statutes.

The District of Columbia, as a municipal corporation, is exempt from garnishment proceedings to collect a judgment owed by one of its employees.

9 As state or territory

While the District of Columbia is not a state, the District exercises many governmental functions commonly performed by states.

Although subject to complete control by Congress, in many respects the District is an entity separate and apart from the general federal system, the powers of Congress over the District being in the nature of those of a state legislature. When Congress acts as a local legislature for the District of Columbia and enacts legislation applicable only to the District of Columbia and tailored to meet specifically local needs, its enactments should, absent evidence of contrary congressional intent, be treated as local law, interacting with federal law as would laws of the several states. However, the laws enacted by Congress as special legislation applicable only to the District are not the general laws of the United States.

For some purposes, the District of Columbia is classified as a state. Thus, it is deemed to be a state within the meaning of certain treaties and acts of Congress. The District of Columbia can also be viewed as a state for the limited purpose such as creating an interstate agency. The extent to which the District of Columbia's rights and responsibilities as defined under a particular statute resemble those of a state must be determined by ascertaining congressional intent on a case-by-case basis.

Judgments rendered by courts of the District of Columbia are entitled to full faith and credit in the courts of the several states, and, conversely, District of Columbia courts must accord full faith and credit to judgments rendered by state courts. The District of Columbia has also been referred to as a territory.

10 Effect on rights of citizens

A citizen of the District of Columbia is not a citizen of a state. For many years citizens of the District of Columbia had no voice in the election of the president and vice-president of the United States; by constitutional amendment, however, the District now chooses electors of these offices in the same manner and to the same number as if the District were a state, but not more than the least populous state.

The District of Columbia is not a state within the intendment of the constitutional provision conferring jurisdiction upon the federal courts in cases of diversity of citizenship. However, by virtue of an act of Congress, the diversity jurisdiction of the federal courts has been extended to citizens of the District of Columbia.

11 Generally

Subject to retention by Congress of the ultimate legislative authority over the nation's capital granted by the Federal Constitution, the District of Columbia Self Government and Governmental Reorganization Act provides that the intent of Congress is to: delegate certain legislative powers to the government of the District of Columbia; authorize election of certain local officials by the registered qualified electors in the District; grant to the inhabitants of the District powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters. Congress also intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions without respect to whether the charter for greater self-government provided for in the code is accepted or rejected by the electors of the District.

Observation: In structuring the government of the District of Columbia, Congress is not bound by the separation of powers limitations that control its powers at the national level.

12 Designated powers

The District of Columbia has been declared to be a body corporate for municipal purposes, which may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of the District of Columbia Code. The District is responsible for all the duties, obligations, responsibilities, and liabilities, and vested with all the powers, rights, privileges, immunities, and assets, respectively, that are imposed upon and vested in the corporation, as created, or the mayor. The District of Columbia, as sovereign, has the inherent right to control the exercise of police powers within its territory.

Reminder: Neither the District of Columbia Council nor its electors can overrule acts of Congress.

13 Council

The District of Columbia Code provides for the creation of a council for the District and for election of the members thereof by the qualified electors of the District. The Code provides for the qualifications of members of the council for holding office

Illustration: A candidate for a council seat remained a resident of the District, as required to establish eligibility to hold public office, during his period of incarceration in Virginia and Pennsylvania, since he never expressed any intent not to return to the District, and he did indeed return upon his release from prison. Lawrence v. District of Columbia Bd. of Elections & Ethics, 611 A.2d 529 (D.C. 1992). and for their compensation.

The legislative authority and the powers of the council are specified in detail in the code. The District of Columbia Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference. The authority of the District of Columbia Council is subject to certain general provisions with respect to Congressional authority and to other specific restrictions contained in the code.

Members of the Council are legislators in every traditional sense and, as such, they enjoy broad First Amendment protections in discharging their responsibilities. Thus, under a District of Columbia statute, council members enjoy legislative immunity and may not be questioned in any other place for any speech or debate made in the course of their legislative duties.

Illustration: Members of the District of Columbia city council have a constitutionally protected right to cast unimpeded votes on matters of public importance and thus could not be enjoined from introducing bills that would have abolished the District Lottery & Charitable Games Control Board and were immunized from claims for damages arising from the introduction of these two bills.

However, the District's local speech or debate statute provides no broader protection than speech or debate clause of Federal Constitution.

The Council of the District of Columbia has the power to investigate any matter relating to the affairs of the district and for such purpose may require the attendance and testimony of witnesses and production of books, papers, and other evidence.

The Council of the District of Columbia has authority to repeal, or to amend in more than technical fashion, laws adopted through initiative process.

14 Mayor

The District of Columbia Code creates the office of mayor of the District of Columbia and makes provision for matters relating to election to, qualification for, and compensation payable for such office. The code further specifies the powers and duties of the mayor, with specific reference to matters such as submission of statements of impact of proposed acts and municipal planning. Under the Comprehensive Merit Personnel Act, the mayor is the personnel authority for the Commission.

15 Neighborhood commissions

The District of Columbia Code provides for the division of the District into a number of neighborhood commission areas, the several commissions being given advisory authority as to matters specified. The authority and responsibilities of such commissions are specified in detail in the code.

District of Columbia advisory neighborhood commissions are not entitled to statutory special notice of an adjudicative proceeding unless the proceeding concerns matter specifically listed in the statute governing such notice. However, statutory notice to District of Columbia advisory neighborhood commissions (ANC) is required for proposed governmental decisions affecting neighborhood planning and development, as specified in ANC statutes.

The District of Columbia Board of Elections and Ethics is authorized to adopt, amend, repeal, and enforce all regulations necessary to carry out the provisions of the code with respect to neighborhood commissions and is further directed to take such steps as are necessary to ensure that the election of members of such commissions provided for is held in an efficient manner.

16 Financial Responsibility and Management Assistance Authority

Congress enacted the District of Columbia Financial Responsibility and Management Assistance Act of 1995 to eliminate budget deficits and cash shortages of the District of Columbia, as well as, inter alia, to ensure the most efficient and

effective delivery of services by the District government. Pursuant to the Act, the District of Columbia Financial Responsibility and Management Assistance Authority was created.

For each fiscal year for which the District government is in a control period, the mayor must develop and submit it to the Authority a financial plan and budget for the District of Columbia subject to specified standards, which must be reviewed by the Authority, and either be approved or disapproved. Additionally, Acts passed by the District government must be submitted to and reviewed by the Authority. The Authority may also restrict borrowing.

Generally, the annual federal payment to the District of Columbia must be made into an escrow account held by the Authority which must allocate funds to the mayor. The mayor must submit reports to the Authority on actual revenues and expenditures and any variances with the financial plan must be certified to various authorities and the Authority may withhold funds from the District government. The Authority may also submit recommendations to the District government regarding management of District affairs.

The Authority may issue bonds, notes or other obligations to obtain funds for the use of the District government, may pledge or grant a security interest in revenues to purchasers of any issued bonds, notes or other obligations, and must establish a debt reserve fund.

Congress, by enactment of statute creating District of Columbia Financial Responsibility and Management Assistance Authority and amendments thereto, delegated its plenary power to run schools of District of Columbia to Authority.

17 Generally

The Constitution of the United States gives Congress power to exercise exclusive legislation in all cases whatsoever over the District of Columbia. In the exercise of this plenary power, Congress has established a judicial system in the District by vesting the judicial power in three federal and two District of Columbia courts. The federal courts so vested are the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia. The District of Columbia courts so vested are the District of Columbia Court of Appeals[n30] and the Superior Court of the District of Columbia.

18 Nature and character of courts

The courts created by Congress for the District of Columbia are permanent establishments, and are constitutional courts of the United States, being ordained and established under Article III of the Constitution.

Courts of the District of Columbia are considered federal courts to the extent that they may take judicial notice of the laws of all the states.

Illustration: The courts of the District of Columbia in an action to recover damages for a negligent act committed in that jurisdiction causing death in another state, which action is based upon the statutes in such case made and provided, took judicial notice of the statutes of such state.

19 Jurisdiction and powers of courts

Subject to the constitutional guarantees of personal liberty, Congress may vest in the courts of the District of Columbia a variety of jurisdiction and powers. The Congress may clothe such courts not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. It may confer upon them jurisdiction over nonfederal causes of action, or over quasijudicial or administrative matters. And congressional enactments have been sustained which conferred powers on the courts of the District of an exceptional and advisory character. However, jurisdiction conferred by Congress on courts of the District of Columbia is limited by the express terms of the act conferring it.

A party asserting a right under the Constitution of the United States or federal laws may lay venue under either the general federal venue statutes or the special District of Columbia statutes, and the courts of the District may exercise their authority in cases committed to them by either.

20 Judges

The judges of the courts of the District of Columbia system are of equal rank and power with those of other inferior courts of the federal system and hold their offices during good behavior. Their compensation cannot, under the Constitution, be diminished during their continuance in office. The provisions of the Federal Constitution vesting the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish, with judges having tenure during good behavior and protection against salary reduction, have been held not to require that prosecution for felonies committed in the District of Columbia be presided over by a judge having the tenure and salary protections

provided therein. The courts of the District of Columbia, no less than other federal courts, may constitutionally impose only such punishment as Congress has seen fit to authorize, even though the courts of the District of Columbia were created by Congress pursuant to its plenary power under the Federal Constitution to legislate for the District (US Const. Art. I ß 8 cl. 17) and are not affected by the salary and tenure provisions of Article III of the Constitution.

21 Superior Court of the District of Columbia and divisions thereof

The District of Columbia Court of General Sessions, the Juvenile Court of the District of Columbia, and the District of Columbia Tax Court were consolidated in a single court known as the Superior Court of the District of Columbia.

The Superior Court of District of Columbia is a court of general jurisdiction, and has the power to adjudicate actions at law or in equity within its jurisdiction. Though each individual division of superior court is entrusted with specific responsibility, must follow pertinent statutory mandates, and must transfer inappropriate cases to proper division, where a claim is related to subject matter within responsibility of division, that division may rely upon its general equity powers to adjudicate a claim and to award relief.

Except for certain matters begun in specified courts within a designated time of the effective date of the reorganization act, the Superior Court has jurisdiction of any civil action or other matter brought in the District of Columbia and over criminal offenses except as otherwise specified. Unless the legislature has divested the superior court of jurisdiction over particular subject matter though enactment of legislation, a court has general jurisdiction over common-law claims for relief.

Illustration: The District of Columbia court had subject matter jurisdiction over a premises liability action even though the action was between Virginia residents and arose from an incident which occurred in Virginia, as the action was not one in which jurisdiction was vested exclusively in a federal court.

The Family Division of the Superior Court has exclusive jurisdiction of actions concerning divorce, revocation of divorce, support, custody, annulment, adjudication of property rights in such actions, adoption, child delinquency, and certain other proceedings.

The Tax Division of the Superior Court has exclusive jurisdiction of all appeals from and petitions for review of assessments of tax, and civil penalties thereon, made by the District of Columbia, and all proceedings brought by the District for the imposition of criminal penalties pursuant to the code provisions relating to taxes levied by or in its behalf.

The Small Claims and Conciliation Branch of the Civil Division in the Superior Court has exclusive jurisdiction of small claims for the recovery of money, if the amount in controversy does not exceed the statutory sum, exclusive of interest, attorney fees, protest fees, and costs.

The All Writs Act provides the superior court with jurisdictional authority, albeit in rare circumstances, to issue emergency relief pending resolution of agency proceedings.

Illustration: The superior court had jurisdiction to review the Contract Appeals Board's (CAB) decisions in a bid protest, and thus, the superior court also possessed power under the All Writs Act to issue temporary relief to a disappointed bidder, even though the CAB had not yet issued a decision. District of Columbia v. Group Ins. Admin., 633 A.2d 2 (D.C. 1993).

22 District of Columbia Court of Appeals

The District of Columbia Court of Appeals has jurisdiction of appeals from all final orders and judgments of the Superior Court of the District of Columbia and certain orders or rulings of the Superior Court appealed by the United States or the District of Columbia. Such appeals lie as a matter of right, except in the case of judgments of the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia and of certain judgments in the criminal division of that court where the penalty imposed is a fine within specified statutory limits, in which case appeals may be allowed in the discretion of the District of Columbia Court of Appeals.

Practice guide: Notice of appeal must designate the judgment, order, or part thereof from which the appeal is taken as appeals may jurisdictionally be taken only from final judgments and orders and in litigation two or more potentially appealable orders may be entered.

To be "final" so as to entitle adversely affected party to an appeal, a court order must dispose of the whole case on the merits so that the court has nothing to do but to execute the judgment or decree already rendered. Appeals are barred

unless the order appealed from disposes of all issues in case; order must be final as to all parties, all subject matter, and all causes of action involved. An order quashing service of process and dismissing a complaint or dismissing a counterclaim without prejudice is an appealable, final order. The denial of a motion to vacate the grant of a mistrial or to limit retrial on the issue of damages or order granting a mistrial or new trial have been held not to be appealable final orders. Applications for the allowance of an appeal would be denied, where an inadequate record existed upon which the Court of Appeals presently should decide most of the issues certified by the trial court, only one of the certified issues, that of pre-emption, could arguably be said to present a controlling question of law, and that issue was open for final determination only by the United States Supreme Court as one of nationwide relevance. The Court of Appeals would not consider issues regarding lessors' claim that rent renegotiation was to be decided by arbitration, even if it had jurisdiction, as issues should not be ruled upon as pure questions of law while facts were still being disputed at the trial court level.

One panel of Court of Appeals does not have the authority to overrule another.

In promulgating rather than applying bar rules, the District of Columbia Court of Appeals acts in legislative rather than judicial capacity; thus, District Court confronted with simple challenge to validity of such rules is not reviewing state-court judicial decision, within meaning of Rooker-Feldman doctrine, and has subject matter jurisdiction.

23 Appeal of interlocutory orders

The District of Columbia Court of Appeals has jurisdiction of appeals from certain interlocutory orders of the Superior Court of the District of Columbia. Such appeals lie as a matter of right. The District of Columbia Court of Appeals has jurisdiction over certain interlocutory orders specified by statute, by court rule, and by collateral order doctrine. Interlocutory appeals may not be taken from an order that appears to be final simply because party has no alternative but to obey or be punished.

However, although it ordinarily reviews only final orders and judgments of superior court, the Court of Appeals will treat certain interlocutory orders as final and collateral, and hence appealable, when they have final and irreparable effect on important rights of parties.

In order for an interlocutory order to be treated as final and collateral and accordingly subject to appellate review, the order must conclusively determine an undisputed question, must resolve an important issue completely separate from merits of action, and must be effectively unreviewable on appeal from final judgment. To fall within the "affecting property" exception to nonappealability of nonfinal orders, an order must change the status quo between the landlord and tenant.

Illustration: A trial court's order granting a vendor possession of real property that was in the possession of the purchaser under an installment land contract was an order changing or affecting possession of property and, thus, was appealable interlocutory order.

The Court of Appeals had jurisdiction of a high school principal's interlocutory appeal from an order denying his motion for summary judgment, which was based in part on assertion of qualified immunity against student's civil rights claim, under collateral order exception to general finality requirement.

An order granting partial summary judgment was appealable pursuant to the exception for appeals from orders "changing or affecting possession of real property," where the order transferred possession of property from its owners and placed it under control of a trustee to manage, to collect rents and profits, and to sell; moreover, the order finally resolved nature and extent of each party's interest in the property.

Trial court's grant of summary judgment against the government in its suit to quiet title in property bid off to it in tax sale was properly appealed as an interlocutory order changing or affecting possession of property, even though trial court had not ruled on allegation of wrongful eviction resulting from allegedly invalid tax sale.

An order vacating a default judgment against a landlord and effectively restoring a tenant to possession of premises was appealable, interlocutory order.

24 Appeal of administrative decisions

The District of Columbia Court of Appeals has jurisdiction to review orders and decisions of certain specified administrative agencies of the District. However, the Court of Appeals has jurisdiction to review order or decision of the mayor or an agency only in a contested case. A court reviewing a record of an administrative proceeding must examine wheth-

er the agencies findings are supported by substantial evidence and if conclusions of law followed rationally from the findings or whether the action was arbitrary capricious or an abuse of discretion. The Court of Appeals may not substitute its own judgment. On appeals of Superior Court's rulings on review of administrative decisions, the Court of Appeals' scope of review is precisely the same as that which it employs in cases that come directly before the Court of Appeals.

Illustration: The Court of Appeals lacked jurisdiction to hear direct appeal from decision of Board of Elections and Ethics denying petitioner's challenge to qualifications of prospective candidate for council seat on residency grounds filed before the Board finally determined candidate's eligibility.

As with federal courts, the All Writs Act is the source of the District of Columbia Court of Appeals' authority to issue temporary relief pending administrative review in a contested case over which the court would eventually have direct reviewing authority.

25 United States District Court for the District of Columbia

The United States District Court for the District of Columbia has jurisdiction of any civil action or other matter begun in the court before the effective date of the District of Columbia Court Reorganization Act of 1970, except for certain matters within the jurisdiction of the Superior Court of the District of Columbia, and various other civil actions and matters, depending on the designated statutory periods beginning on the effective date of the reorganization act. Jurisdiction is also conferred on the United States District Court for the District of Columbia of any civil action begun in the court during the thirty-month period beginning on the effective day of the reorganization act wherein the amount in controversy exceeds that specified in the code provision; excluded from this provision, however, are actions involving matters over which the Superior Court is given specific jurisdiction under the code.

Illustration: Despite provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, under law pertaining to federal question jurisdiction, references to laws of the United States or acts of Congress do not include laws applicable exclusively to the District of Columbia, the District Court for the District of Columbia retained full federal question subject matter jurisdiction, and had jurisdiction over a complaint raising a constitutional challenge to a local District of Columbia statute.

Caution: A later case has held that reference to law of the United States would not include provisions of the DC Code enacted by Congress. Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976). However, the District of Columbia Home Rule Act does not apply exclusively to the District of Columbia; thus, the Act could provide a basis for the exercise of federal question jurisdiction in an action brought by former employees of the United States Department of Labor who were transferred to the District of Columbia Department of Employment Services, seeking an injunction which would either reinstate them to the federal competitive service or would grant them identical rights, benefits and privileges.

In addition, the United States District Court for the District of Columbia has jurisdiction under the code of various classes of criminal offenses in addition to its jurisdiction as a United States District Court and any other jurisdiction conferred on it by law.

The Federal Rules of Civil Procedure provide that whenever the law of a state in which the District Court is held is made applicable in such rules, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. The law to be applied under this rule is not that law which is generally applicable as federal law elsewhere as well as in the District, but rather that law which is locally applicable in the District. Federal courts located in the District of Columbia will apply choice-of-law and substantive decisional rules of District of Columbia courts when appropriate although, because of the District's unique position, the Rules of Decision Act does not bind federal courts to that result, the District's law is applied out of deference to authority of the District of Columbia Court of Appeals as the highest court of the District and in order not to subvert the aims of the Erie doctrine.

The term "state" includes the District of Columbia where appropriate, and that the term "statute of the United States" includes acts of Congress locally applicable in the District of Columbia.

26 United States Court of Appeals for the District of Columbia Circuit

In addition to its jurisdiction as a United States Court of Appeals and as otherwise conferred by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the District of Columbia Court of Appeals with respect to violations of criminal laws of the United States which are not applicable exclusively to the District of Columbia if a petition for allowance of an appeal from the judgment is filed within the statutory

time after entry thereof, or entered before the effective date of the District of Columbia Court Reorganization Act of 1970 in any other case if a petition for allowance of an appeal from the judgment is filed within a designated time after its entry.

Practice guide: Decisions rendered by the United States Court of Appeals for the District of Columbia Circuit prior to the effective date of the Court Reorganization Act, even if subsequently overruled by that court, would remain valid and binding case law in the District of Columbia court system until such time as they might be modified or set aside by the District of Columbia Court of Appeals.

The Court of Appeals for the District of Columbia Circuit has the power to adopt a narrowing construction of a provision enacted by Congress rather than by the District of Columbia council.

Observation: The traditional policy of the Supreme Court of the United States is to refuse to review a determination of local law of the District of Columbia by the Court of Appeals for the District of Columbia Circuit in all but exceptional cases.

27 Generally

In accordance with the rule applicable to municipal corporations generally, the District of Columbia is liable in tort for injuries caused in the exercise of a proprietary, as opposed to a governmental, function. The District of Columbia could be held liable for tortious acts of one of its employees against another, however, supervisory employees could not be held liable under theory of respondeat superior.

Illustration: The District of Columbia was liable to respond in damages, under the theory of respondeat superior, for the intentional torts of its police officers acting within the scope of their employment. However, the District of Columbia was not liable for injury and wrongful death of lifeguards employed by an independent contractor who leased a swimming pool from the District, where the District had no actual control or responsibility over the swimming pool at the time of the accident.

The District is responsible for such negligence of its employees or officers having the care of streets, avenues, and sidewalks as results in personal injuries to individuals. The neglect of district officers to keep the public ways of the city in safe condition is the neglect of the municipal corporation, although they are subject to the permanent authority of Congress; the fact that the fee simple of the streets of the City of Washington is in the United States does not affect such liability.

Observation: Public interest may often be implicated in greater measure in cases in which District of Columbia is party than in purely private litigation, and appellate courts should not be blind to such considerations.

28 Operation of motor vehicle

Under the District of Columbia Code, the defense of governmental immunity may not be asserted by the District in any suit at law against it to recover money damages for death or injury to person or property caused by the negligence of an employee of the District in the operation of a motor vehicle within the scope of his office or employment.

In the case of a claim arising out of the operation of an emergency vehicle on an emergency run, the District is liable only for gross negligence.

Illustration: No plain error or miscarriage of justice occurred when a trial court incorrectly instructed a jury that the District of Columbia could be liable on negligent supervision theory even if no representative of District was found to be grossly negligent; the District never objected to the instruction or expressed dissatisfaction with it, and, in its proposed verdict form, the District effectively invited trial court to treat negligent supervision as requiring only ordinary negligence.

29 Notice requirements

The District of Columbia Code provides that no action may be maintained against the District for unliquidated damages to person or property unless, within the time designated after the injury or damages was sustained, notice in writing is given to the commissioner (mayor) of the District with respect to the approximate time, place, cause, and circumstances of the injury or damage. Minor inaccuracies in the notice are not ordinarily fatal to the cause of action. Inquiry into the adequacy of a notice is limited to the information contained in the notice. Compliance with the notice requirement is a question of law that the Court of Appeals reviews de novo.

30 Settlement of claims

The District of Columbia Code authorizes the mayor of the District, in his discretion, to settle claims founded on torts of District employees where the District, if a private individual, would be liable prima facie to respond in damages, irrespective of whether the negligence occurred in the performance of a municipal or governmental function of the District.